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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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**Commissioner Marshall resigned effective April 30, 1993.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
BILL NELSON, and JIM SMITH

Against Station WCIX-TV,
Miami, Florida

ORDER

Adopted: June 2, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed on November 27, 1991, on behalf of Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith ("Complainants"), which alleged that WCIX-TV, Miami, Florida, "systematically overcharged legally qualified candidates for use of the station"[1] during the September 4, 1990 primary and the November 6, 1990 general elections in violation of the lowest unit charge and comparable use requirements of Section 315(b) of the Communications Act of 1934, as amended.[2] Mr. Chiles and Mr. Martinez were legally qualified candidates for nomination and election for Governor of the State of Florida for the primary and general elections; Mr. Nelson was a legally qualified candidate for the Gubernatorial nomination for the primary election; and Mr. Smith was a legally qualified candidate for nomination and election for Secretary of State of Florida for the primary and general elections. The Mass Media Bureau also has before it an answer to the complaint filed on March 12, 1993 by CBS Inc., licensee of WCIX-TV.[3]

2. We have reviewed the information presented pursuant to the guidelines set forth in the *Declaratory Ruling* and the political broadcasting law as it existed at the time of the 1990 primary and general elections prior to the *Codification of the Commission's Political Programming Policies ("1991 Codification Report")*, 7 FCC Rcd 678 (1991). We have concluded that further discovery is not warranted, given that Complainants have failed to establish a *prima facie* case with respect to each of the alleged section 315(b) violations.[4] Specifically, as discussed below, we find that Complainants have not established a *prima facie* case that WCIX-TV refused to offer candidates various rates and rate-related benefits, steered candidates toward purchasing higher-priced, non-preemptible classes of time, impermissibly increased political rates during election periods, discriminated between candidates, or overcharged candidates during the 1990 comparable use periods. Additionally, we conclude that Complainants' allegations regarding WCIX-TV's failure to retroactively apply its general election rate reductions, as well as its failure to afford candidates spot-separation guarantees, did not establish bases for relief under section 315(b).[5]

A. Complainants' Allegations That WCIX-TV's Two-Tiered Political Rate Structure Failed to Offer Candidates the Various Preemptible Rates and Steered Candidates Toward Purchasing the Higher-Priced Non-Preemptible Rates

3. Complainants submitted WCIX-TV's political rate card for the 1990 primary period, which specified immediately preemptible rates and higher-priced, candidate-only, non-preemptible rates for the various time periods and programs. In creating higher-priced, non-preemptible rates for candidates only, Complainants contended that WCIX-TV violated the principles of *Hernstadt v. FCC*, 677 F.2d 893,

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[1] Complaint at 4.

[2] Section 315 provides:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. §315(b). *See also* 47 C.F.R. §73.1942(a).

[3] In addition, the Mass Media Bureau has before it Complainant's amended complaint filed January 27, 1992, a second amended complaint filed February 3, 1992 and proposed discovery order filed February 6, 1992. The *Declaratory Ruling* in *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511, 7513 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*) , which established the procedures for the handling of section 315(b) complaints, only contemplated the filing of a complaint and answer at this stage of the proceeding. As stated in *WTVT*, 7 FCC Rcd 6661 (MMB 1992), henceforth pleadings other than the complaint and the answer will not be accepted without a showing that the information presented is new and vital to the resolution of the dispute, and that with reasonable diligence it could not have been discovered previously. Furthermore, we find that the rate discrimination allegation raised in the amended complaint is repetitive and, as discussed in paras. 20-21, *infra*, fails to establish a *prima facie* case. We also find that the spot separation argument raised in the second amended complaint, as discussed in paras. 25-26, *infra*, fails to establish a basis for relief under section 315(b).

[4] In order to invoke the Commission's enforcement procedures and receive discovery opportunities, a complainant alleging section 315(b) violations must establish a *prima facie* case. The *Declaratory Ruling* set forth the standards to be used to determine whether this showing has been made. *See* 6 FCC Rcd at 7513 and n.47.

[5] It should also be pointed out that WCIX-TV argued that the complaint, filed fifteen months after the 1990 general election, was not timely and should be dismissed. The *Declaratory Ruling*, 7 FCC Rcd at n.46, merely stated that section 315(b) complaints should be filed with the Commission in a timely manner; however, it did not prescribe any time limits. We believe that the complaint was timely filed, particularly in light of the fact that stations must maintain their political files for a period of two years after the elections. *See* 47 C.F.R. §73.1943(c); *see also WTVT*, 6 FCC Rcd 6661 (MMB 1992).

900-902 (1980). Moreover, Complainants claimed that WCIX-TV's use of a two-tiered political rate card effectively steered candidates toward purchasing higher-priced, non-preemptible spots, by failing to "disclose and offer" to candidates the various preemptible rate levels available to commercial advertisers, inconsistent with *Outlet Communications*, 5 FCC Rcd 2835 (MMB 1990), *aff'd*, 7 FCC Rcd 632 (1992).

4. WCIX-TV responded by stating that its two-tiered political rate card in effect during the primary was consistent with, and specifically endorsed by, the Commission at the time, citing *Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations* (*"1988 Public Notice"*), 4 FCC Rcd 3823 (1988). WCIX-TV argued that it was not until the *Political Programming Audit* (*"1990 Audit Report"*), 68 RR 2d 113 (MMB 1990), released after the Florida primary, that stations were required to effectively abandon their two-tiered political rate structures and to affirmatively disclose to candidates the availability of all intermediate preemptible rates and discount privileges.[6] Thus, WCIX-TV contended that it would be fundamentally unfair to impose any sanctions retroactively or order any rebates based solely on its two-tiered political rate structure or its alleged failure to disclose affirmatively rate information to candidates.

5. WCIX-TV further denied that its political rate card steered candidates toward purchasing higher-priced, non-preemptible spots. WCIX-TV distinguished *Outlet Communications, supra,* where the station was found to have steered candidates toward higher-priced, fixed spots. The station in *Outlet Communications* refused to offer candidates a specific class of time that was available to commercial advertisers, and did not air any candidate spots at preemptible rates. In contrast, WCIX-TV stated that it did not refuse to sell candidates any specific class of time, and indeed sold many candidates (including three of the complainants)[7] preemptible spots.

6. WCIX-TV is correct in stating that at the time of the Florida primary, the Commission had not previously articulated broadcasters' affirmative duty to disclose all rates and discount privileges to candidates. Thus, we believe that WCIX-TV's two-tiered political rate structure, by itself, neither violated section 315(b), nor the principles of *Hernstadt, supra.* The affirmative disclosure duty was not articulated until the *1990 Audit Report.* [8] Moreover, the language in the *1988 Public Notice* recognized, and reasonably may have been interpreted as implicitly approving, the practice of selling candidate-only, higher-priced, non-preemptible classes of time.[9] Further, *Hernstadt* did not necessarily preclude candidate-only classes of time. Rather, *Hernstadt* stood for the proposition that stations must offer candidates all rates and discount privileges that are available to commercial advertisers.[10] Consistent with *Hernstadt, Outlet Communications, supra,* held that stations could not steer candidates toward higher-priced spots by refusing to sell candidates all the classes of commercial time. The principles of *Hernstadt* and *Outlet Communications* remain basic tenets of political broadcasting law today.[11] The issue thus is not whether WCIX-TV violated section 315(b) by failing to affirmatively disclose rate information at the time of the primary, but whether the station refused to make available to candidates all rates and discounts otherwise available to commercial advertisers and effectively steered candidates toward the purchase of only higher-priced, non-preemptible time.

7. At the outset, we note that the partial set of political logs furnished by Complainants refutes the contention that WCIX-TV in any way "steered" candidates toward the purchase of *only* higher-priced, non-preemptible classes of time. The logs demonstrate that all candidates (for which logs were furnished) purchased both preemptible and non-preemptible spots. Moreover, in several instances, it appears that these same Complainants purchased intermediate priced preemptible spots, as well. Specifically, while it appears that WCIX-TV sold candidates a preemptible rate of $200 and a non-preemptible rate of $300 during the 6:30-7:30 PM news period, there were numerous instances where Chiles and Nelson purchased an intermediate rate of $250 during that period, as well as a few instances where Nelson purchased the $300 non-preemptible rate.

8. We find that Complainants have not made a *prima facie* case that WCIX-TV refused to make available to candidates all discount rates and privileges by effectively steering candidates toward purchasing non-preemptible time. In *Outlet Communications, supra,* the candidate's media buyer provided the Commission with affidavits that established that the candidate specifically requested, but was denied, rate information and the opportunity to purchase intermediate preemptible levels of time.[12] There was no such showing here. Complainants did not allege, nor provide affidavits attesting to the fact, that they requested rate information and that WCIX-TV declined to convey such information, or that they requested to purchase various levels of preemptible time and that WCIX-TV refused to sell them such rates, or that WCIX-TV in any way attempted to "steer" candidates toward the purchase of higher-priced, non-preemptible spots. Moreover, as noted above, the materials furnished by Complainants demon-

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[6] As discussed in paras. 17-18, *infra,* WCIX-TV revised its political sales practices and rate structure for the 1990 general election by eliminating the candidate-only, higher-priced non-preemptible rates, in response to the *1990 Audit Report.*

[7] WCIX-TV also stated that during the primary period, Mr. Smith did not purchase any time on the station. Given that the complaint focuses upon the political rates and sales practices in effect during the primary period, it appears that Mr. Smith could be dismissed at the outset. However, because we do not find that *any* candidate made a *prima facie* case, it is not necessary to dismiss Mr. Smith separately.

[8] *See 1990 Audit Report,* 68 RR 2d at 116-117; *see also 1991 Codification Report,* 7 FCC Rcd at n.89; *KDFW-TV,* 6 FCC Rcd 7491 (MMB 1991).

[9] 4 FCC Rcd at 3823.

[10] In *Hernstadt,* the court characterized run-of-schedule ("ROS") spots as both a class of time and a discount privilege, which if offered to commercial advertisers, must also be made available to candidates. In this connection, it should also be noted that at the time of the 1990 Florida primary, Section 73.1940(b)(2) then provided, in pertinent part, that, "All discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office."

[11] *See 1991 Codification Report,* 7 FCC Rcd at 687-689. Of course, stations must not only make available to candidates all rates and rate-related benefits, but now must also affirmatively disclose the same to candidates or their representatives.

[12] *See* 7 FCC Rcd at 633.

strate that the candidates purchased both preemptible and non-preemptible rates, and that two of the Complainants appear to have purchased intermediate level rates as well.

B. WCIX-TV's Alleged Failure to Disclose to Candidates Its Make-Good Policy During the 1990 Primary Election Period

9. Complainants contended that during the 1990 primary election period, WCIX-TV afforded its most favored commercial advertisers time-sensitive make-goods, but apparently failed to offer, or disclose the availability, of the same to candidates. The failure to offer or disclose the availability of time-sensitive make-goods, according to Complainants, "had the purpose and effect of forcing candidates to use the specially designed, higher non-preemptible rate."[13]

10. WCIX-TV responded by stating that, consistent with the *1988 Public Notice*, its policy in effect during the 1990 primaries was to afford candidates with pre-election make-goods,[14] and it would have disclosed the same to any candidate that inquired. In light of the fact that there was no affirmative disclosure requirement in place at the time of the 1990 primary, WCIX-TV claimed that it should not be retroactively penalized for failure to disclose to candidates the availability of time-sensitive make-goods.[15]

11. As previously stated, at the time of the 1990 Florida primary, stations did not have an affirmative duty to disclose rate information or rate-related benefits to candidates.[16] The *1988 Public Notice* merely required that stations air candidates' make-goods prior to the election if they ever provided their most favored commercial advertisers with time-sensitive make-goods.[17] We find that WCIX-TV's policy was consistent with section 315(b) interpretations at the time.

12. We further find that Complainants failed to make a *prima facie* showing with respect to this issue. Complainants did not furnish affidavits to indicate that they requested, and were denied, information concerning WCIX-TV's make-good policy, or that they were denied timely make-goods, or that they were in any way steered toward purchasing non-preemptible time.[18] Moreover, Complainants' allegations are belied by the partial set of political logs that they furnished. Candidates were not steered toward the higher-priced non-preemptible spots, for they often purchased preemptible spots. Additionally, it appears that at least on one occasion a candidate received a make-good prior to the election.

C. WCIX-TV Allegedly Impermissibly Increased Political Rates

13. Complainants alleged that during both the 1990 primary and general elections, WCIX-TV overcharged candidates by impermissibly increasing the political preemptible and non-preemptible rates. Complainants further alleged that WCIX-TV raised the political rates during news programs, which are most favored by candidates. Complainants attributed the political rate increases solely to candidate demand. According to Complainants, it was not only impermissible to raise political rates based on candidate demand, it was discriminatory as well, since commercial advertisers could lock in rates for periods of time and remain unaffected by advertiser demand.

14. WCIX-TV asserted that the rate increases occurred as a result of the station's ordinary business practices, affected a variety of programming, and contrary to Complainants' unsubstantiated allegation were not driven by candidate demand. Additionally, WCIX-TV stated that it was not precluded from raising political rates by virtue of the fact that it locks in rates for its most favored commercial advertisers. Rather, WCIX-TV stated that it was required to factor such long-term commercial rates into its lowest unit rate calculations, which it did.

15. It is firmly established that stations may increase preemptible, as well as non-preemptible, political rates during election periods in accordance with their ordinary business practices (e.g., seasonal variations, advertiser demand, audience ratings).[19] Section 315(b) accords candidates most favored commercial advertiser status, and thus entitles them to the benefits of all long-term commercial rates and discounts for the same class, amount of time, and daypart or program.[20] The issue, therefore, is whether WCIX-TV overcharged candidates during the 1990 elections by impermissibly increasing its political rates and failing to provide candidates the benefits of the long-term commercial rates.

16. We find that Complainants have not made a *prima facie* showing of any overcharges. Complainants made the bare allegation that the rate increases were inconsistent with the station's normal business practices, and were improperly motivated to take advantage of candidate demand.[21] Moreover, Complainants did not even allege that the long-term commercial rates were excluded from the station's lowest unit charge calculations, or that candidates paid more than *any* commercial advertiser -- whether long-

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[13] Complaint at 7.

[14] *See 1988 Public Notice*, 4 FCC Rcd at 3823.

[15] WCIX-TV further stated that, as the complaint acknowledged, the station included the required disclosure regarding its make-good policy in its political rate card in time for the 1990 general election, in accordance with the affirmative disclosure requirements set forth in the *1990 Audit Report*, which was released after the 1990 Florida primary election.

[16] *See* para. 6, *supra*.

[17] Since the 1990 Florida primary, the requirements pertaining to make-goods have changed. Stations now are required to offer candidates pre-election make-goods if they gave any commercial advertiser a time-sensitive make-good within the year preceding the lowest unit charge periods, and affirmatively disclose the same to candidates. *See 1991 Codification Report*, 7 FCC Rcd at 689-690, 697; *see also 1990 Audit Report*, 68 RR 2d at 116-117.

[18] In order for candidates to be entitled to rebates in this regard, they would have to make a *prima facie* showing that the station's make-good policy was inconsistent with section 315(b) interpretations at the time, and further demonstrate that with the assurance of timely make-goods they would have otherwise purchased lower-priced, preemptible spots. *See* n.13, *supra*.

[19] *See 1991 Codification Report*, 7 FCC Rcd at 693-694; *1988 Public Notice*, 4 FCC Rcd at 3824; *The Law of Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2280 (1978); *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 524-526 (1972).

[20] *See 1991 Codification Report*, 7 FCC Rcd at 693-694; *The Law of Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2279 (1978); *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 528-529 (1972).

[21] In fact, the partial set of political program logs demonstrated that candidates purchased preemptible and non-preemptible spots in a variety of programming, and did not limit their orders to news programming.

term or not -- for similar spots. Complainants did not offer any evidence, nor attempt to substantiate in any way, their allegations of overcharges. Bare allegations without any factual support are insufficient to establish a *prima facie* case of overcharges.[22]

D. Complainants' Allegation That WCIX-TV Should Provide Rebates to Candidates that Purchased Spots During the Primary Period Based on the Station's September Rate Reductions

17. Complainants stated that in September of 1990, during the general election period, WCIX-TV revised its political sales practices, and attached a copy of the revised political rate card to its complaint. The September political rate card eliminated the candidate-only, higher-priced, non-preemptible rates. Instead, WCIX-TV afforded candidates the lowest preemptible rates and established a policy of not preempting candidates. According to Complainants, WCIX-TV thus effectively converted its lowest preemptible rates into non-preemptible rates and established a new lowest unit charge for non-preemptible time. Under the circumstances, Complainants argued that rebates should be issued to candidates that previously purchased non-preemptible spots in July and August of 1990 (based on the difference between the then-higher non-preemptible rates and the lower September "non-preemptible" rates).

18. WCIX-TV denied that candidates that paid non-preemptible rates in July and August of 1990 during the primary period were entitled to rebates based on the revised general election September rates. WCIX-TV asserted that the July/August and the September rates applied to separate elections, and involved different rate structures and sales practices. Specifically, the September general election rates and rate-related benefits reflected a change in the station's political sales practices in response to the *1990 Audit Report*.

19. We agree with WCIX-TV. The lower September general election rates do not affect the higher July and August primary election rates, and thus candidates that purchased non-preemptible spots during the primary period are not entitled to rebates based on the rates in effect during the general election period. Each election is treated separately for purposes of the lowest unit charge, as well as the reasonable access and equal opportunities provisions contained in 47 U.S.C. §312(a)(7) and §315(a).[23] Therefore, with respect to this issue, Complainants have not established any basis for relief under section 315(b).

E. WCIX-TV Allegedly Engaged in Political Rate Discrimination

20. Complainants charged that WCIX-TV violated section 73.1940(c) of the Commission's Rules,[24] by discriminating between candidates, and cited an example where two candidates were allegedly charged different rates for apparently the same daypart during the primary election period. WCIX-TV responded by explaining that the different rates were attributable to the fact that the particular candidates purchased spots in different programs with different ratings and different advertising demands.

21. The *1988 Public Notice* specifically recognized the practice of selling advertising on a per program basis.[25] Where a station sells time by programs, the non-discrimination provision of the Commission's rules only applies to discrimination between candidates for spots purchased for the same class, amount of time, and *same program*. We find that Complainants have failed to establish a *prima facie* case of rate discrimination between candidates. Complainants did not indicate that the candidates purchased time in specific programs; WCIX-TV refuted Complainants' allegations by identifying the specific program buys of each candidate, thereby establishing the basis for the differences in rates.

F. WCIX-TV Allegedly Overcharged Candidates During the Comparable Use Periods

22. Complainants alleged that WCIX-TV violated section 315(b) by "consistently" charging candidates that purchased time outside the lowest unit charge periods higher rates than comparable commercial advertisers. WCIX-TV characterized the allegation as "completely unsubstantiated." We agree with WCIX-TV. Complainants made no attempt whatsoever to provide any specific information to substantiate their claim that WCIX-TV overcharged candidates during the 1990 comparable use periods. As stated previously, a bare allegation without more is insufficient to establish a *prima facie* case of overcharges.[26]

G. WCIX-TV Allegedly Failed to Apply Commercial Spot-Separation Policy to Candidates

23. In their second amended complaint, Complainants stated that WCIX-TV guaranteed commercial advertisers adequate separation between spots purchased by advertisers promoting similar products or services. Complainants charged that WCIX-TV violated section 315(b) by failing to treat candidates as their most favored commercial advertisers and providing the same guaranteed separation

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[22] We recognize that an examination of the station's logs, contracts and invoices would determine conclusively whether the rate increases were consistent with the station's normal business practices and whether the long-term commercial rates, in fact, were factored into the station's lowest unit charge calculations. However, we do not believe that bare allegations, without any factual substantiation whatsoever, can justify going forward with discovery and permitting access to the station's records.

[23] *See The Law of Political Broadcasting and Cablecasting*, 69 FCC Rcd 2209, 2237, 2279 (1978).

[24] Section 73.1940(c) was renumbered to section 73.1941(e) in the *1991 Codification Report*. Section 73.1941(e) provides, in pertinent part, as follows:

> In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage....

[25] 4 FCC Rcd at 3824.

[26] *See* para. 16, *supra*.

between opposing candidates' spots. Specifically, Complainants cited two examples where it appeared that candidates' spots ran consecutively.

24. WCIX-TV argued that unlike make-goods that affect the value of spots and are considered in lowest unit charge calculations, commercial spot-separation policies do not affect rates and thus should not be considered for purposes of section 315(b). Moreover, WCIX-TV maintained that the implementation of such a policy for candidates during elections could create equal opportunity and reasonable access problems. In fact, the examples cited by the Complainants occurred between one and two days before the primary and general elections -- a period of high candidate demand.

25. Section 315(b) accords candidates most favored commercial advertiser status in terms of advertising rates and sales practices, which generally affect the value of spots and/or determine the particular classifications of time (e.g., make-goods, preemption priorities).[27] The Commission has never held that commercial spot-separation guarantees are relevant for purposes of section 315(b).

26. We do not find that spot-separation guarantees affect classifications of time, in general, or determine the value of spots for candidates, in particular. In so finding, we recognize that such guarantees may prove valuable to commercial advertisers, but note that political campaigns differ from the marketing of products or services. Whereas spot separation guarantees may be an integral part of commercial marketing strategies, in political campaigns there is no commensurate value in "product protection." More importantly, we agree with WCIX-TV that to require that stations afford candidates spot separation guarantees, particularly near elections, could very well jeopardize section 315(a) equal opportunities and section 312(a)(7) reasonable access requirements. Based on the foregoing, we conclude that spot-separation guarantees should not be considered relevant for purposes of section 315(b). Therefore, we find that Complainants did not establish a basis for relief under section 315(b) in this regard.[28]

CONCLUSION

27. ACCORDINGLY, we find that CHILES, MARTINEZ, NELSON and SMITH failed to make a *prima facie* case of a violation of any obligation arising under section 315(b). Therefore, the complaint against WCIX-TV is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart
Chief, Mass Media Bureau

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[27] *See Codification Report*, 7 FCC Rcd at 689-690.

[28] Notwithstanding our finding that spot-separation guarantees are not relevant for section 315(b) purposes, we note that WCIX-TV provided the candidates the requested relief. WCIX-TV stated that its policy was to notify candidates of back-to-back political placements, and because notification apparently was not issued in the cited examples, WCIX-TV issued refunds to those particular candidates. Thus, there is no basis for relief even if spot-separation guarantees *were* relevant for section 315(b) purposes.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For a Construction Permit for
New Television Station, Channel 2,
Fredericksburg, Texas

Appearances

James F. Ireland, III, Robert G. Scott, Jr., Susan Whelan Westfall, and *Janet R. Thompson* on behalf of Global Information Technologies, Inc.; *Dan J. Alpert* on behalf of Texstar Communications, Ltd.; *Robert Lewis Thompson* on behalf of Frontier Broadcasting, Inc.; *Joel H. Levy* and *J. Brian DeBoice* on behalf of Fredericksburg Channel 2; *Jeffrey D. Southmayd* and *Stephen C. Simpson* on behalf of Hal S. Widsten; *Merilyn M. Strailman, Ronald D. Maines,* and *Kay A. Morrell* on behalf of Stonewall Broadcasting, Inc.; and *Robert A. Zauner* on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: June 2, 1993; Released: June 17, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.[1]

Board Chairman MARINO:

1. Six applicants remain in this comparative broadcast proceeding for authority to construct a television station on Channel 2 at Fredericksburg, Texas: Global Information Technologies, Inc. (Global); TexStar Communications, Ltd. (TexStar); Frontier Broadcasting, Inc. (Frontier); Fredericksburg Channel 2 (FC2); Hal S. Widsten (Widsten); and Stonewall Broadcasting, Inc. (Stonewall). Before the Review Board are: (1) the *Initial Decision* (*I.D.*), 4 FCC Rcd 5445 (1989), of Administrative Law Judge Edward Luton (ALJ) granting Stonewall's application for the Fredericksburg facility; (2) a *Supplemental Initial Decision* (*S.I.D.*), 6 FCC Rcd 6912 (1991), disqualifying TexStar following the Board's remand for further hearing on that applicant's financial qualifications; and (3) the parties' exceptions and replies to both decisions.[2] The parties have also furnished supplemental engineering data and related comments[3] in accordance with our instruction in *Global Information Technologies, Inc.* (*Coverage Order*), 7 FCC Rcd 3795 (Rev. Bd. 1992).

BACKGROUND

2. In the *I.D.*, the ALJ disqualified Frontier under a site availability issue, and then compared the remaining applicants, applying the standards established in the Commission's *Policy Statement on Comparative Broadcast Hearings* (*Policy Statement*), 1 FCC 2d 393 (1965). *I.D.*, ¶ 135. He found that Global, FC2, and Stonewall merit 100% credit for their proposals to "integrate" all of their voting stockholders into the full-time management of their facilities, and that Stonewall is preferred over Global due to its proposal's superior coverage and qualitative enhancements to integration and over FC2 due to a slight diversification advantage. *Id.* at ¶ ¶ 126, 141, 147, 152. After a November 27, 1989 oral argument, the Board tentatively concluded that TexStar's comparative proposal -- which, albeit marginally inferior to Stonewall's on a quantitative basis, featured minority participation and superior coverage -- was comparable to Stonewall's. Before the Board could undertake a comparison between the two, however, it was first necessary to resolve questions raised by Stonewall concerning TexStar's financial qualifications. *Global Information*

[1] Board Member Greene, who was not a member of the Board at the time of the oral argument in this proceeding, has read the transcript of that session in accordance with 47 CFR § 1.277(f).

[2] Also before the Board are: (a) petitions for leave to amend filed by Global on Nov. 22, 1989, Dec. 14, 1989, and June 4, 1990; by Widsten on Aug. 8, 1989, Sept. 8, 1989, and Nov. 16, 1989; and by Stonewall on Feb. 16, 1993; (b) a request for official notice filed by TexStar on July 21, 1989; (c) citations of additional authority filed by FC2 on Feb. 5 and 28, 1992; (d) oppositions filed by Stonewall on Feb. 6, 1992, and Mar. 3, 1992, and by Global on Feb. 18, 1992; (e) a motion for leave to file a supplement to exceptions and supplemental exceptions filed by TexStar on Aug. 31, 1992; (f) an opposition filed by Stonewall on Sept. 10, 1992; and (g) a statement for the record filed by FC2 on Sept. 2, 1992.

[3] They are: (a) a joint supplement to engineering exhibit submitted on Aug. 14, 1992; (b) comments filed by Stonewall and Global on Aug. 14, 1992; by the Mass Media Bureau (Bureau) on Aug. 21, 1992; and by TexStar on Aug. 25, 1992; (c) a motion to dismiss Stonewall and Global's comments filed by the Bureau on Aug. 25, 1992; (d) oppositions filed by Stonewall and Global on Sept. 3, 1992; (e) comments on Stonewall and Global's comments filed by FC2 on Aug. 25, 1992; (f) a contingent motion to reopen the record filed by FC2 on Sept. 16, 1992; and (g) oppositions filed by Global, Stonewall, and the Bureau on Sept. 25, 1992.

Technologies, Inc. (*Production Order*), 5 FCC Rcd 535 (Rev. Bd. 1990). Following a review of supplemental financial information submitted by TexStar, the Board remanded the proceeding to the ALJ for further hearing "[t]o determine whether TexStar Communications, Ltd. was and is financially qualified to be a Commission licensee." *Global Information Technologies, Inc.* (*Remand Order*), 5 FCC Rcd 3385, 3387 (Rev. Bd. 1990). The ALJ thereafter resolved the issue adversely to TexStar. *S.I.D.*, ¶ ¶ 39-54.

3. Based on our review of the ALJ's findings and conclusions in light of the pleadings and the evidentiary record, and for the reasons set forth below, we affirm the disqualification of TexStar and Frontier. Because, however, our analysis of the remaining applicants under the standard comparative issue differs from the ALJ's, we modify the *I.D.* and conclude that FC2's application is preferred. We turn first to the *S.I.D.'s* disqualification of TexStar and its exceptions thereto, beginning with a brief chronological review of the facts.

FINANCIAL QUALIFICATIONS

4. *Background.* Lesvia Guerra-Cox filed TexStar's application on February 12, 1987, certifying that (FCC Form 301, Section III (April, 1985 ed.)):

> sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.

S.I.D., ¶ 3. In subsequent amendments reporting the formation of a partnership and the addition of partners, she confirmed the continuing validity of the information contained in the application, including the certification to financial qualifications. *Id.* at ¶ ¶ 4-5. In December 1987, under an order to exchange documents illustrating a principal's involvement in obtaining application financing, TexStar produced portions of two letters from NBC Bank signed by its president, Charles D. Lutz, III. The entire text of the first letter, dated February 10, 1987, was redacted, but the second letter, dated April 6, 1987, was produced intact. It invited Guerra-Cox and her new general partner to meet with Lutz "to discuss various ways in which we might be able to assist you in meeting your financial needs." 5 FCC Rcd at 536. At her deposition on January 22, 1988, Guerra-Cox testified that NBC Bank was the "sole source" of financing to support TexStar's financial certification and that she had spoken with no other financial institutions about financing the application prior to its filing, including her "local bank," the First RepublicBank. *S.I.D.*, ¶ ¶ 6, 30, nn.2-3. Stonewall filed a motion to enlarge issues on February 18, 1988, alleging that TexStar lacked financial qualifications.

5. On February 24, 1988, Guerra-Cox repeated in testimony before the ALJ at the initial hearing that TexStar's financial certification was premised on the February 10, 1987 letter from NBC Bank and that TexStar's "sole basis for construction and assurance for the funds for the operation of the station are [sic] the NBC [Bank] letter." *Id.* at ¶ 7, n.4; Tr. 331. In its opposition to Stonewall's issue request, filed on March 10, 1988, TexStar reiterated its exclusive reliance on NBC Bank stating (Stonewall Exh. R-19 at 3 (emphasis in original, footnotes omitted)):

> As was repeatedly testified to during depositions, TexStar has specifically *not* sought alternative sources of financing, *e.g.*, from limited partners, due to the fact that it had *already* secured an assurance from a financial institution to support the requirement that it obtain a "reasonable assurance" of the availability of funds to construct and initially operate its proposed station prior to filing its application.

The ALJ denied Stonewall's motion. *Memorandum Opinion and Order*, FCC 88M-1514, released May 20, 1988.

6. Stonewall continued its attack on TexStar's financial qualifications in contingent exceptions to the *I.D.* In its reply submitted to the Board on August 31, 1989, TexStar continued to maintain that (Stonewall Exh. R-20 at 4 (emphasis in original, footnote omitted)):

> TexStar's certification is based upon a letter to TexStar from the NBC Bank of San Antonio, Texas, dated February 10, 1987. Cox Dep. TR 69. As was repeatedly testified to during depositions, TexStar has specifically *not* sought alternative sources of financing . . . .

Upon the Board's initial review of the exceptions, it ordered TexStar, on January 26, 1990, to produce the full text of the February 10, 1987 NBC Bank letter and "all documents and related evidence that would support a continuing bank loan commitment." 5 FCC Rcd at 536. On March 7, 1990, TexStar disclosed for the first time the complete text of the bank letter upon which its financial certification was based. That letter opens (TexStar Response to Review Board Order, Attachment 1):

> Thank you for stopping by and discussing with us your application for Channel 2 in Fredericksburg, Texas, filed on behalf of TexStar Communications. We understand your financial needs to construct and operate the station for six months should not exceed $8,000,000.00. Although we have not reviewed the financial information required by us to fully consider a loan commitment, we are seriously interested in exploring ways in which we could assist you in meeting your financial needs.

See also 5 FCC Rcd at 3385 (where the letter is reproduced in full). In addition to the NBC Bank letter, TexStar's submission to the Board included letters from two other banks: (1) a letter dated January 28, 1988, from First RepublicBank; and (2) a letter dated March 1, 1990, from the First National Bank of Kerrville. TexStar Response, Attachments 2, 6.

7. In comments accompanying its submission, TexStar asserted that it has continually met the Commission's reasonable assurance standard for financial qualifications under any of *three* funding sources. *Id.* at 9. TexStar explained that Lutz was no longer with NBC Bank and that the bank had refused Guerra-Cox's request for "a current letter of assurance explaining that although Mr. Lutz was no longer at NBC they were still willing to work with us." *Id.*, Attachment 5 at 4. TexStar maintained, however, that the bank did not "revoke" the letter. *Id.* at 5 n.1. Contrary to all of its prior representations, TexStar then claimed that it has had, since before its application was filed in 1987, a *second* source of bank financing to support its financial

certification, and that this alternative assurance "can stand alone in support of TexStar's initial qualifications." *Id.* at 13. TexStar revealed that Guerra-Cox had contacted her local bank, First RepublicBank, about financing her application in January 1987, and that she had obtained from that institution a verbal assurance of funding *before* filing the application. Republic's purported pre-filing assurance was reduced to writing one year later, on January 28, 1988, in a letter from F. Ed Guzman, a Republic vice president. *Id.* at 6-8. However, TexStar explained further, because Republic had since adopted internal regulations governing loans to start-up broadcast stations, until such time as TexStar could obtain additional assurances from that bank, its current financial qualifications depended instead upon financing from a third bank -- the First National Bank of Kerrville -- evidenced by a March 1, 1990 letter. *Id.*, Attachment 5, at 6. Unable to resolve TexStar's financial qualifications on the basis of the new information before it, the Board enlarged the issues and remanded the proceeding to the ALJ. 5 FCC Rcd at 3387.

8. *S.I.D.* TexStar offered no evidence at the remand hearing to support the validity of its initial commitment from NBC Bank, but stipulated that it no longer relies on that bank for its certification to financial qualifications. Instead, it now seeks to base its initial qualifications on "oral assurances" obtained from Republic prior to filing. *S.I.D.*, ¶ 16. As the ALJ observed (*id.*):

> TexStar now seeks to establish its financial qualifications, as of the time it certified those qualifications in its application, not by reference to the only funding source on which it actually relied at that time, but rather through reliance on an entirely different source -- one which TexStar, by its own repeated admissions, placed no actual reliance, either when it certified its financial qualifications or, (at a bare minimum) for more than one year thereafter.

He concluded that because TexStar abandoned its support on NBC Bank and failed, in any event, to establish the sufficiency of the arrangements with that bank, TexStar cannot be found initially financially qualified based on any communications from NBC Bank. *Id.* at ¶ 39. Moreover (*id.* at ¶ 41 (emphasis in original)):

> Commission precedent forbids TexStar from shifting its reliance from the only source on which it did rely [to support its financial certification] to a source on which it concededly did *not* rely at the relevant time. *See, e.g., Aspen FM, Inc.*, [6 FCC Rcd 1602, 1603-04 (1991)] (the applicant's "original financial proposal at the time of certification" must be found valid before subsequent changes in the proposal will be allowed); *Pepper Schultz*, 5 F.C.C. Rcd. 3273, 3273 (1990) (applicant whose original financial proposal was deficient due to its own lack of diligence may not subsequently seek to alter the proposal and must be disqualified); *Opal Chadwell*, 4 F.C.C. Rcd. 1215, 1217 (1989), *recon. granted on other grounds sub nom. Dorothy [O]. [S]chultz*, 5 F.C.C. Rcd. 3227 (1990) (validity of applicant's original financial proposal must be established before reliance on a new proposal will be permitted); *Coastal Broadcasting Partners*, 5 F.C.C. Rcd. 734, 734-35 (Rev. Bd. 1990) (absent grant of a good cause amendment, the only relevant issue is what "exactly [the applicant's] financial proposal was at the time of certification").

9. With regard to Guerra-Cox's purported reliance on a verbal assurance from Republic, the ALJ concluded, based on TexStar's repeated acknowledgements prior to the involuntary unveiling of the NBC Bank letter, that its original financial proposal "involved no reliance whatsoever on any assurance from First Republic Bank" and, therefore, that "TexStar's original financial proposal was plainly deficient." *S.I.D.*, ¶ 40. In addition, he found Guzman's testimony insufficient to corroborate Guerra-Cox's assertion that their discussions had preceded the application's filing in February 1987 and, even if they had, they did not convey reasonable assurance of financing. *Id.* at ¶ ¶ 46-50. As for Guzman and Republic, the ALJ concluded (*id.* at ¶ 46 (emphasis in original)):

> Even if TexStar were to be allowed at this late date to shift its initial reliance from NBC Bank to the alleged pre-filing "assurance" of First Republic Bank, the ultimate result would not be altered. The so-called verbal "assurance" which Mr. Guzman gave to Guerra-Cox plainly amounted to no more than an expression of First Republic Bank's "interest" in receiving a loan application from Guerra-Cox. The descriptions of the alleged verbal "assurance" which Guerra-Cox herself gave during her remand phase testimony indicate that Mr. Guzman merely expressed an "interest" in the matter, and Guzman himself stated that the so-called "assurance" merely "encouraged [Guerra-Cox] to consider us" and informed her that "*if* she got what we needed . . . [and] *if* it was satisfactory, we should give her an approval." Tr. 2542 (emphasis added). As Guzman acknowledged, and as the circumstances under which the so-called "assurance" was given in any event make quite plain, Guzman had no idea at the time whether Guerra-Cox could supply what was "needed" and would be "satisfactory" to support an eight million dollar (or any other) loan. He therefore told her only that his bank was "interested," and "encouraged her to consider" seeking financing from his bank.

10. TexStar maintains in exceptions that: (1) due to an intervening change in the law legitimizing oral financial arrangements, the fact that TexStar did not actually rely on assurances from Republic when it executed its application does not foreclose TexStar from relying on Republic now (TexStar Remand Exceptions at 5, 8-9, citing *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19, (1989)); (2) Guerra-Cox's testimony establishes, despite Guzman's "minimal uncertainty," that the verbal assurance predated the filing of the application (TexStar Exceptions at 19); and (3) the verbal assurance conveyed reasonable assurance of committed funds even though Guzman received no financial information on the borrower because "the assurances were *not* based upon Ms. Guerra-Cox's net worth, or even her credit history, but rather, on the perceived value of the project." *Id.* at 4-5, 14 (emphasis in original).

11. *Discussion.* The Commission's financial qualifications standard requires:

> reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 11 (Rev. Bd. 1986), review denied, 2 FCC Rcd 1476 (1987), recon. granted in part, [] 3 FCC Rcd 1200 (1988).
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> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue . . . ."

Northampton, 4 FCC Rcd at 5518-19, *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd* 941 F.2d 1214 (D.C. Cir. 1991).

12. In the event that the committed source of funds upon which an applicant's financial certification relies becomes unavailable after the application's filing, the applicant is required to report this change in status pursuant to § 1.65 of the Commission's rules, 47 CFR § 1.65. *See Texas Communications Limited Partnership*, 7 FCC Rcd 3186, 3187 (1992), *denying recon.* 6 FCC Rcd 5191 (1991); *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6842 (Rev. Bd. 1991); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5172-73 & n.9 (1990), *denying rev.* 4 FCC Rcd 7945 (Rev. Bd. 1989) (subsequent history omitted). Should it thereafter obtain a new source of funds, in order to re-establish its financial qualifications, the applicant must amend its application to include the revised financial proposal. *See Texas Communications*, 6 FCC Rcd at 5192. If the amendment is filed after the application's designation for hearing, it must be accompanied by a good cause showing sufficient to meet the requirements of § 73.3522(b) and the six-part test enunciated in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970). *See Capitol City Broadcasting Co.*, 7 FCC Rcd 2629 (1992). An essential ingredient of the good cause showing for acceptance of a post-designation financial plan is a demonstration that the applicant was *initially* financially qualified. *See Aspen FM, Inc.*, 6 FCC Rcd at 1603; *see also, e.g., Pontchartrain Broadcasting Co., Inc.*, 8 FCC Rcd 2256, 2256-57 (1993). The Commission recently noted that: "[w]e have been increasingly stringent in enforcing this requirement." *Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, 7999 (1992).

13. TexStar concedes that its initial financial qualifications were exclusively based on NBC Bank. Accordingly, in order to modify its financial plan to rely on assurances received from Republic, or from any other funding source, TexStar must establish the validity of those initial assurances from NBC Bank. Because TexStar has abandoned its reliance on NBC Bank and presented no evidence to support its initial financial qualifications based on arrangements with that bank, we must affirm the *S.I.D.'s* disqualification of TexStar for its failure to meet its burden of proof that it was financially qualified when it executed its application in 1987. *Aspen FM*, 6 FCC Rcd at 1603. Therefore, we must also agree that TexStar may not, as a matter of law, establish its financial qualifications through arrangements concluded with other financial institutions. *Id.; Texas Communications*, 6 FCC Rcd at 5192. We further reject TexStar's argument that it should, despite *Aspen FM*, be permitted to retroactively base its initial assurances of financial qualifications on the Guzman oral assurance in view of the clear precedent to the contrary and: (1) TexStar's repeated assertions that it contacted no other financial institutions -- including Republic -- before filing the application; (2) its continuation of this representation before the Board in reply exceptions following the release of the Commission's decision in *Northampton;* and (3) its silence as to the existence of the oral assurance (and its corresponding failure to produce a copy of the 1988 Republic letter in discovery) until the Board's 1990 *Production Order. See Sunshine Broadcasting, Inc.*, 6 FCC Rcd 5981 (Rev. Bd. 1991) (*post hoc* rationalization at hearing regarding existence of an alternative oral financing agreement insufficient to overcome doubts raised by principal's earlier contrary deposition testimony), *recon. denied*, 7 FCC Rcd 493 (Rev. Bd. 1992). Nor does *Opportunity Broadcasting of Shreveport*, 6 FCC Rcd 1499 (Rev. Bd. 1991), cited by TexStar, support its thesis. There an applicant whose lending bank had failed long ago was permitted to rely on financing from a limited partner because the applicant had the alternative financing plan "from the outset." *Id.* at 1501. Here, we hold TexStar to its original representations that it had no such alternative plan at the outset. *Compare Coastal Broadcasting Partners*, 5 FCC Rcd 734, 734-35 (Rev. Bd. 1990) (remand to determine whether applicant attempted to expand her original financial proposal, without proper amendment, from sole reliance on the proceeds from the sale of her stamp and coin collection, to reliance on *all* of her personal assets).

14. Even if we were to credit TexStar's account of prefiling reliance on an oral commitment from Republic, we further agree with the *I.D.* that TexStar failed to demonstrate that it received reasonable assurance of an $8 million loan from that contact. As we have often stated:

> [I]n order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether . . . the prospective borrower has provided the bank with [the borrower's assets, credit history, current business plan, and similar] data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that

> adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893, *recon. dismissed*, 6 FCC Rcd 4626 (1991), *aff'd by judgment sub nom. Mid-Ohio Radio, Ltd. v. FCC*, No. 91-1418 (D.C. Cir. March 26, 1993); *see also Liberty Productions*, 7 FCC Rcd 7581, 7584 (1992).

15. TexStar admits that its discussions with Republic's Guzman included no information on Guerra-Cox's personal finances or net worth, but argues that the commitment was based instead on the value of the project. However, Guzman had little knowledge of the project's value, had no background in broadcast lending, performed no research on the market, and did not know whether Guerra-Cox had any experience in broadcasting. Tr. 2459-61, 2468, 2500, 2517. He had only Guerra-Cox's spoken assurances on the value of the Fredericksburg facility, which were in turn based on her own unsupported assumptions, and lacked specific information on the proposal, its costs, the value of its assets, or its expected revenues. *S.I.D.*, ¶ ¶ 17-18; Tr. 1913-23, 1939-42, 1954-55, 1963-64, 2153-58, 2225-26, 2460. *Compare Welch Communications, Inc.*, 8 FCC Rcd 1285, 1286 (1993) (reasonable assurance where MESBIC independently determined viability of market); *Salt City Communications, Inc.*, 8 FCC Rcd 683, 685-87 (1993) (same). Because it is clear that Guzman did not review TexStar's individual qualifications or otherwise determine that the applicant passed initial muster for a loan, no reasonable assurance of financing resulted from Guerra-Cox and Guzman's alleged pre-filing discussion. *See Christina Communications*, 2 FCC Rcd at 1974; *Dutchess Communications Corp.*, 101 FCC 2d 243, 246 n.4 (Rev. Bd. 1985); *see also Isis Broadcast Group*, 7 FCC Rcd 5125, 5126, *recon. denied*, 8 FCC Rcd 24 (Rev. Bd. 1992). Moreover, TexStar has failed to establish that the terms of the loan were specifically identified during the pre-filing discussion. *S.I.D.*, ¶ ¶ 20, 27; Tr. 1943, 1953, 2155, 2160-63, 2489-91, 2525, 2542. Accordingly, we conclude that Guzman's "oral assurance," far from expressing a commitment to loan funds, future conditions permitting, was "clearly no more than a routine invitation to apply for a potential loan," regardless of whether it actually preceded the filing of TexStar's application. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980); *Marlin Broadcasting*, 4 FCC Rcd at 7947.

TRANSMITTER SITE AVAILABILITY

16. The *I.D.* disqualified Frontier for failure to obtain reasonable assurance of the availability of its transmitter site prior to filing its application. *I.D.*, ¶ 135. Frontier initially selected the same site that Global had specified in its application filed three months earlier. On February 10, 1987, Frontier principal Mitchell Johnson reviewed the engineering portion of Frontier's application, which was predicated on Global's site coordinates, and certified that he had obtained reasonable assurance from William A. Honig, identified as the site owner's agent, that the land would be available to Frontier for construction and use of a new television tower. TexStar Exh. 15. On the following day, Johnson telephoned Honig for the first time and engaged him in a three-minute conversation about the property. Frontier then filed its application on February 12th. *I.D.*, ¶ ¶ 64-68.

17. The ALJ added a site availability issue against Frontier based on declarations by Honig, the site's owner, that he had given only Global permission to use his land and that he had not discussed or reached any understandings with Frontier on the use of his property. *Memorandum Opinion and Order*, FCC 87M-2654, released October 23, 1987. Honig did not appear at the hearing, but Johnson testified that he had obtained reasonable assurance from him as a result of the single telephone contact. *I.D.*, ¶ 66. The existence of the call to Honig is supported by a telephone bill extract and Johnson's contemporaneous notes which reflect (TexStar Exh. 14):

> Mr. Honig said property "was spoken for". Asked him if it didn't work out if he would negoitiate [sic]. He said "next year."

Although Johnson could no longer recall the specifics of their conversation, he testified that after Honig's initial response that the property was already "spoken for," Johnson told him that Frontier was likely to win the proceeding and asked whether he would make with Frontier "[w]hatever deal he made with [Global]." Tr. 1006. Johnson understood from Honig that he would be agreeable to such an arrangement and that they could discuss it next year. Johnson admitted, however, that he knows nothing about the "deal" between Honig and Global or even if Global proposed a similar tower configuration as Frontier. *I.D.*, ¶ 67; Tr. 1011-12. Asked about the second sentence of his notes of the discussion, Johnson explained: "[i]t[] meant that we didn't talk details of the specifics of the deal, and that that would come next year or whenever. My inference was that whenever it became certain that we won." Tr. 1007.

18. The *I.D.* concluded from these facts that the evidence of Frontier's efforts fell short of establishing reasonable assurance of the availability of the site (*I.D.*, ¶ 135):

> Reasonable assurance requires "more than a vague ... willingness to deal'" on the part of the site owner. *Progressive Communications, Inc.*, 61 RR 2d at 563; *Houston Family Television, Limited*, 101 FCC 2d at 664. Although a binding agreement or absolute assurance is not necessary, "a mere possibility, assumption, or hope that the site will be available will not suffice." *Houston Family Television, Limited*, 101 FCC 2d at 664. What is required is either "a formal option to lease the land" or "informal discussions with the land owner . . . which result in a meeting of the minds as to the key lease terms upon which the land will be made available." *Progressive Communications, Inc.*, 61 RR 2d at 563. Frontier had neither. Accordingly, reasonable assurance was not present.

19. In exceptions, Frontier argues that Johnson's brief contact with Honig was sufficient to establish reasonable assurance of site availability under *National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987). In that case, the Commission, acting on a petition to deny, declined to set for hearing the tentative selectee of a low power television lottery whose transmitter site assurance was based on an uncorroborated telephone conversation

with the site owner's agent. Frontier posits that reasonable assurance merely requires "some indication of the property owner's favorable disposition toward making an arrangement with the applicant." Frontier Exceptions at 8.

20. We disagree that Frontier has satisfied the Commission's requirements. A closer reading of *National Innovative* reveals that the assurance for the site, on which there was an existing tower, was based on three telephone conversations and later confirmed in writing. 2 FCC Rcd at 5641-43. Here, by contrast, we have no written confirmation or other corroboration that the site was made available to Frontier. Most important, however, is the fact that Johnson's own notes indicate that he and Honig agreed only to discuss in the future, in the event that Frontier received the permit, whether the land would be available to it, and under what terms. Thus, Honig, far from evincing a favorable disposition toward making an arrangement with Frontier, merely indicated a willingness to discuss with him in the future the possibility of making an arrangement. Although the Commission's standard for reasonable assurance of site availability is indeed a liberal one, it does require "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant" for the use of the site. *Barry Skidelsky*, 7 FCC Rcd 1, 7 (Rev. Bd. 1992) (*quoting Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990)) (subsequent history omitted). Here, Johnson's contemporaneous notes indicate that Honig was, at most, willing to discuss site availability in the future. This dialogue clearly falls short of the Commission's minimum requirement that the applicant and landowner reach "a meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, 3 FCC Rcd 3595, 3595 (Rev. Bd. 1988); *see also National Communications Industries*, 6 FCC Rcd 1978, 1978-79 (Rev. Bd. 1991), *modified on other grounds*, 7 FCC Rcd 1703, *recon. denied sub nom. Liberty Productions*, 7 FCC Rcd 7581 (1992). The ALJ's disqualification of Frontier is affirmed.

COMPARATIVE ISSUE

21. Because TexStar and Frontier have been eliminated from consideration, four applicants remain for evaluation under the standard comparative issue. Under that issue, we seek to determine which application, if granted, would best promote the primary objectives of the *Policy Statement:* (1) greatest diversification of control of the media of mass communications; and (2) best practicable service to the public. 1 FCC 2d at 394. Under the latter criterion, we consider the proposal's efficient use of the frequency ("coverage"), and the participation of the station's owners in the management of the proposed station ("integration"). *Id.* at 395-96, 398-99.

DIVERSIFICATION

22. The *I.D.* accorded FC2 a slight diversification demerit for sole general partner Bob A. Roth's involvement as president and 20% stockholder of San Antonio Channel 2, permittee of low power television station KO2MX, Channel 2, San Antonio, Texas. *I.D.*, ¶ ¶ 78, 141. Although FC2 stated in its direct written testimony that Roth intended to divest this interest, the pledge is untimely since it was not made by the B cut-off date. *Id.* at ¶ ¶ 139-141, citing *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 188 (Rev. Bd. 1986). FC2 excepts to the assessment of the demerit asserting that no formal divestiture commitment was necessary because the LPTV facility will be automatically displaced as a consequence of the initiation of operation of the Fredericksburg facility here at issue. Because, it explains, KO2MX transmits from within the Grade B contour of FC2's proposed co-channel television station, it will be forced off the air by operation of § 74.703 of the Commission's rules, which requires an LPTV licensee to suspend operations in the event that it is unable to resolve interference with a full power television facility. FC2 Exceptions at 6-9. Global and Stonewall argue that the *I.D.* should have given a more weighty demerit due to the proximity of the media interest to Fredericksburg. Global Exceptions at 39; Stonewall Exceptions at 18-19.

23. Diversification of control of the media of mass communications is a factor of primary significance in the comparative analysis. *Policy Statement*, 1 FCC 2d at 394. In evaluating the effect of other media interests on an applicant's comparative proposal, the Commission generally considers the size and nature of the ownership interest; the location of the interests relative to the community of license; and the significance of the interest in terms of the area covered, the size of the audience (or circulation), and other media there present. *Id.* at 394-95; *see also, e.g., Caldwell Broadcasting Corp.*, 104 FCC 2d 438, 439-40 (1986). In decisions examining the weight to be accorded to interests in low power television facilities, a diversification demerit of minimal to slight weight has been assessed due to the secondary nature of the LPTV service, its inherently limited coverage potential, its minor significance in the media marketplace, as well as the distance of the facilities held to those requested. *See Mark L. Wodlinger (Billings, MT)*, 3 FCC Rcd 3139, 3142 (Rev. Bd. 1988) (proximity of in-state and adjacent state LPTV facilities "offset by reduced significance accorded LPTV facilities *vis a vis* full power stations"); *Mark L. Wodlinger (Naples Park, FL)*, 101 FCC 2d 762, 769 (Rev. Bd. 1985) (single, distant LPTV station interest given minimal weight for diversification purposes), *citing Low Power Television Service*, 51 RR 2d 476 (1982); *see also Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1240 (Rev. Bd. 1987) (slight diversification demerit for attributable interests in 21 LPTV stations, 2 UHF TV stations, and one cable TV system) (subsequent history omitted); *Jarad*, 1 FCC Rcd at 188 (very slight diversification demerit for principal's management role at nearby LPTV station where divestiture pledge untimely); *Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 445-46 (Rev. Bd. 1985) (interest in nine distant LPTV stations warrants very slight diversification demerit), *rev. denied*, 59 RR 2d 1267 (1986).

24. The exceptors have demonstrated no basis upon which to increase the slight diversification demerit assessed by the ALJ for FC2's single LPTV interest. With reference to the precedent, we find that the significance of the station's presence within the service area is moderated by its intrinsically limited nature as a low power and secondary service, the presence of a multitude of other media voices in San Antonio (one of the top fifty major television markets, *see* 47 CFR § 76.51), and by the fact that the ownership interest is minor and limited to a single media outlet. *Cf. Las Americas Communications, Inc.*, 1 FCC Rcd 786, 791-92 (Rev. Bd. 1986) (subsequent history omitted). FC2 argues that the very proximity of KOMX2 to Fredericksburg will likely be the facility's undoing in light of the probability that it will be required to suspend operations due to resulting interference from the full-power

co-channel Fredericksburg facility. *See* 47 CFR § 74.703; *cf. Neighborhood TV Co., Inc.*, 100 FCC 2d 1396 (1985) (returning LPTV application due to predicted interference to authorized full power television station); *Garnerlynn Communications*, 99 FCC 2d 1176 (1984) (same). Because the slight diversification demerit assessed against FC2 does not prove comparatively fatal to that application, *see infra* ¶ 40, FC2's assertion that the demerit should be reduced or eliminated need not be decided. FC2 Exceptions at 5-11. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2296 (1991) (agency need not decide questions not relevant to ultimate decision) (*quoting Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960)) (subsequent history omitted).

COMPARATIVE COVERAGE

25. The *I.D.* awarded a moderate-to-substantial comparative coverage preference to FC2 and Widsten over Stonewall for their superior coverage of underserved areas -- areas currently receiving four or fewer over-the-air television signals -- as well as for their greater overall coverage. *I.D.*, ¶ 149. Each of the applicants was also accorded a substantial comparative coverage preference over Global due to its "minute" service (service to less than 200 persons) to underserved areas and its far lesser overall coverage. *Id.* at ¶ 151. The *I.D.* found that the proposals would provide the following coverage (*id.* at ¶ ¶ 123-24):

Total Areas and Populations Served

Applicant	Area (sq. mi.)	Population (1980 census)
Global	7,644	198,704
FC2	13,601	1,682,100
Widsten	15,438	1,740,615
Stonewall	10,381	1,165,707

Uncommon Areas Served (sq. mi.)

Applicant	First	Second	Third	Fourth	Fifth
Global	none	none	2	2	8
FC2	none	125	879	371	103
Widsten	none	188	1,143	433	136
Stonewall	none	32	265	243	73

Uncommon Populations Served (1980 census)

Applicant	First	Second	Third	Fourth	Fifth
Global	none	none	51	24	124
FC2	none	447	3,517	2,377	465
Widsten	none	418	4,839	3,137	523
Stonewall	none	42	1,324	2,543	166

26. As pointed out by the parties, the *I.D.'s* findings of underserved area coverage are understated; they reflect only each proposal's unique coverage of underserved areas, thereby omitting those areas encompassed by more than a single proposal. Global Exceptions at 13-14; FC2 Exceptions at 18 n.25; TexStar Exceptions at 15-16 n.21, 32 n.43; Bureau Reply Exceptions at 3-4; Tr. 1755-59 (Oral Arg.). When common underserved areas are factored into the evaluation, the parties' proposed service to underserved areas is (Joint Engineering Exh. 2 at 8, 11-13, 15):

Areas Served (sq. mi.)

Applicant	First	Second	Third	Fourth	Fifth
Global	none	168	714	947	772
FC2	none	293	1,591	1,316	867
Widsten	none	356	1,855	1,378	900
Stonewall	none	200	977	1,188	837

Populations Served (1980 census)

Applicant	First	Second	Third	Fourth	Fifth
Global	none	168	4,585	2,843	20,244
FC2	none	615	8,051	5,196	20,565
Widsten	none	586	9,373	5,956	20,623
Stonewall	none	210	5,858	5,362	20,266

This correction to the underserved area coverage data does not alter the *I.D.'s* comparative ranking of the applicants, although it does indicate that Global will provide more than "minute" coverage to underserved areas. Tr. 1828-29 (Oral Arg.); Bureau Reply Exceptions at 4.

27. The analysis of underserved area coverage was properly predicated on the Commission's then-existing policy of excluding from consideration coverage by noncommercial educational television stations. Following the release of the *I.D.*, however, the Commission modified that policy and announced that such signals should henceforth be included in computations of underserved area coverage. *Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188, 5188-89 (1991), *recon. dismissed*, 7 FCC Rcd 1694 (1992), *aff'd by judgment sub nom. Kansas City TV 62 Limited Partnership v. FCC*, No. 91-1491 (D.C. Cir. May 10, 1993). Because the inclusion of noncommercial signals could diminish the comparative coverage credit received by the applicants in this proceeding, the Board directed the parties to prepare a revised engineering exhibit in conformance with the policy change. *Coverage Order*, 7 FCC Rcd at 3795. In a joint supplement to engineering exhibit submitted on August 14, 1992, the parties (with the exception of Widsten, who did not participate) demonstrated that noncommercial signals had no effect on the underserved areas and populations data reported in the 1988 joint exhibit. The Bureau agreed that the supplemental engineering showing did not alter the comparative standing of the applicants. Bureau Comments at 2.

28. In exceptions, Global maintains that its opponents should receive only a slight comparative coverage preference for their marginally superior service to underserved areas and their significantly greater service to well-served areas. Global Exceptions at 13-18. Stonewall asserts in its contingent exceptions that Widsten should receive only a slight preference for its superior overall coverage. Stonewall Exceptions at 39. Global and TexStar join Stonewall in arguing that FC2 should receive no coverage credit because its site proposal is indefinite due to its apparent willingness to relocate its site should it receive approval to construct a 2000-foot tower. *Id.* at 38-39; Global Exceptions at 41-44; TexStar Exceptions at 32-36. In comments accompanying the engineering supplement, Global and Stonewall urge the Board to include in the analysis of underserved area coverage the availability of other video services (*e.g.*, cable, television translators) which, they state, would have the effect in this case of significantly reducing the underserved area coverage proposed by the parties and, correspondingly, the credit awarded them therefor. Global Comments at 10-20; Stonewall Comments at 11-13. Stonewall also includes in its comments new arguments

which are essentially untimely exceptions to the *I.D.'s* award of coverage preferences. These assertions are entitled to no consideration pursuant to 47 CFR § 1.277(a). *See F.E.M. Ray, Inc.*, 7 FCC Rcd 4606, 4606 (1992); *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6843 n.1 (Rev. Bd. 1991). Finally, in lieu of comments, FC2 submitted on September 16, 1992, a contingent motion to reopen the record to receive an "up-to-date" comparative coverage study based on current station contours and the 1990 census. Relying on the data contained in its proffered exhibit, FC2 maintains that it should receive a substantial coverage preference for its superior provision of first and second services. FC2 Motion to Reopen at 5. Global, Stonewall, and the Bureau oppose the motion.

29. *Discussion.* The most substantial preferences for comparative coverage are reserved for applicants who propose transmission of a first or second service (known respectively as white and grey area service) to their service areas. *See FBC, Inc.*, 95 FCC 2d 256, 259-61 (Rev. Bd. 1983) (substantial preference for provision of first television service to 2,309 persons and second service to 355 persons); *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982) (moderate preference for provision of second service to 4,456 persons), *rev. denied*, FCC 83-230, released July 7, 1983. The Commission accords a lesser preference to applicants providing new third, fourth, and fifth services to substantial populations. *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 231-32 (Rev. Bd. 1984) (slight-to-moderate preference to applicant proposing new third, fourth, and fifth television services to 85,353 more persons than opponents, as well as greater overall coverage) (subsequent history omitted); *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112-13 (Rev. Bd. 1984) (slight preference for provision of third and fourth services to 3,616 more persons than opponent), *rev. denied*, 100 FCC 2d 941 (1985). A slight preference may also be awarded to applicants providing substantially greater overall coverage to well-served areas. *See Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 (1991) (marginal preference for 22% differential in overall population service); *Simon Geller*, 90 FCC 2d 250, 276 (1982) (slight preference to applicant with four times greater coverage to well-served areas) (subsequent history omitted); *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 583 (Rev. Bd. 1984) (slight preference for 24% coverage differential to well-served areas) (subsequent history omitted). Based on our analysis of the corrected coverage data and governing precedent, we agree with the exceptors that the *I.D.'s* award of coverage preferences was exaggerated. We conclude, as amplified below, that FC2, Widsten, and Stonewall merit a slight-to-moderate coverage preference over Global and that FC2 and Widsten should receive a preference of the same weight over Stonewall.

30. FC2, Widsten, and Stonewall's proposals provide more than five times greater overall coverage than Global and they therefore deserve, as Global concedes, a slight comparative preference for superior service to well-served areas.[4] These applicants are additionally entitled to further credit for their greater service to underserved areas relative to Global. FC2 and Widsten propose more second service than Global (615 and 586 persons compared to 168), and significantly more third and fourth services (combined totals of 13,247 and 15,329 persons compared to Global's 7,428). Stonewall proposes second, third, and fourth services to 11,430 persons compared to Global's 7,596. Although FC2 and Widsten, and to a lesser extent, Stonewall, each propose larger grey area service, the numbers involved are too slight to warrant the award of a moderate preference. *See Northern Sun Corp.*, 100 FCC 2d 889, 894 (Rev. Bd. 1985) (very slight preference awarded for provision of second nighttime aural service to 242 persons and a third and fourth service to 391 more persons than opponent) (subsequent history omitted); *Christian Broadcasting*, 99 FCC 2d at 583 (first service to 180 persons too small to warrant a substantial preference); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 529 (Rev. Bd. 1976) (first nighttime service to 617 more persons than opponent too small to warrant a decisive preference). Accordingly, FC2, Widsten, and Stonewall each receive an additional slight preference for their superior coverage of underserved areas. When combined, the slight preferences for overall coverage and underserved area coverage yield FC2, Widsten, and Stonewall a slight-to-moderate comparative coverage preference over Global. *See Marlin Broadcasting*, 4 FCC Rcd at 7956 (slight-to-moderate preference for greater third, fourth, and fifth services and overall coverage); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 699 (Rev. Bd. 1984) (slight-to-moderate preference for provision of greater fourth and fifth services and overall coverage) (subsequent history omitted).

31. FC2 and Widsten also merit, at most, a slight comparative advantage over Stonewall for their greater overall coverage of well-served areas (a differential of approximately 30%). *See Cuban-American Ltd.*, 2 FCC Rcd 3264, 3270 (Rev. Bd. 1987) (slight preference for coverage differential of almost 20%) (subsequent history omitted); *Christian Broadcasting*, 97 FCC 2d at 583 (slight preference for coverage differential of 24%). They warrant a further slight preference for their provision of greater second service than Stonewall (405 more persons by FC2; 376 more persons by Widsten) and superior third service (2,193 more persons by FC2; 3,515 more persons by Widsten). *See White Mountain FM, Inc.*, 54 RR 2d 1465, 1466 (Rev. Bd. 1983) (slight-to-moderate preference for provision of second daytime aural service to 1,258 persons, compared to opponent's 215 persons, and second night service to 3,150, compared to opponent's 397) (subsequent history omitted); *Radio Jonesboro*, 96 FCC 2d at 1112-13 (slight preference awarded for nighttime service to 171 more persons and combined third and fourth services to 3,616 more persons than opponent). Thus, FC2 and Widsten receive a slight-to-moderate coverage preference relative to Stonewall.

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[4] FC2 urges the Board to award it a moderate (or stronger) coverage preference for its 850% greater overall coverage compared to Global, a difference, it asserts, that is of an unprecedented dimension. FC2 Exceptions at 20-21 n.30. We decline to depart from well-established precedent that *any* degree of superior overall coverage of well-served areas merits no more than a slight preference in the rubric of the Commission's standard comparative issue. *See Simon Geller*, 90 FCC 2d at 276 (only slight preference for four-fold greater overall coverage because "the significance of this superiority is diminished by the existence of at least five other aural services available both day and night in that area") (subsequent history omitted); *Daytona Broadcasting*, 97 FCC 2d at 232.

32. In so concluding, we deny as speculative the exceptions regarding the permanence of FC2's site proposal. *See Beach Broadcasting*, 6 FCC Rcd at 4485-86 (denying as speculative contention that opponent should not receive coverage preference because it may seek to upgrade its facilities in the future); *Kennebec Valley*, 2 FCC Rcd at 1240-41 (rejecting as speculation and surmise argument that coverage preference should be denied due to conditional FAA approval). We also reject, for reasons detailed in previous cases, the requests to include alternative video sources in our analysis of underserved area coverage. *See WCVQ, Inc.*, 7 FCC Rcd 4849, 4851 (Rev. Bd. 1992); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 5631, 5634 (Rev. Bd. 1988) (and cases cited therein), *rev. denied*, 5 FCC Rcd 5561 (1990). Finally, we deny FC2's motion to reopen the record and reject its proffer of an updated engineering study. Because FC2 was a party to the joint engineering supplement submitted only one month earlier, it may not now complain that the study should be disregarded. *See Washoe Shoshone*, 5 FCC Rcd at 5564 (former co-sponsors of joint engineering exhibit not permitted to rebut exhibit); *WCVQ*, 7 FCC Rcd at 4851 (same); *see also Daytona Broadcasting*, 97 FCC 2d at 225-30 & n.42 (post-hearing updated coverage data not considered due to administrative finality doctrine).

INTEGRATION

33. *Widsten.* Widsten, an individual applicant, excepts to the *I.D.'s* rejection of his proposal to integrate into the management of the proposed Fredericksburg facility on a full-time basis. Widsten Exceptions at 3-7. Widsten accepts, however, the findings of facts supporting the ALJ's conclusion. *Id.* at 3. To wit: shortly before filing the instant application, Widsten tendered, on October 2, 1986, an application for authority to construct a new FM station at Oro Valley, Arizona. *I.D.*, ¶ 79. In an exhibit to that application Widsten stated his intention to relocate to Oro Valley and to serve as the Arizona station's full-time general manager. FC2 Exh. 12. Widsten filed his Fredericksburg application four months later on February 12, 1987. On October 8th of that year, the date set by the Presiding Judge for the filing of integration and diversification statements in the Fredericksburg proceeding, Widsten stated his intention to remain in Texas and to serve as the full-time general manager of the Fredericksburg station. *I.D.*, ¶ ¶ 79, 144. On January 15, 1988, after his deposition, Widsten amended the Oro Valley application to withdraw his integration statement for that facility. *Id.* at ¶ 79. The *I.D.* concluded that because Widsten's Fredericksburg integration proposal was "completely inconsistent with his outstanding, unretracted full-time Oro Valley integration proposal" on the October 8, 1987 integration statement exchange date, the Fredericksburg proposal could not be credited. *Id.* at ¶ 145.

34. Widsten maintains that the dual integration proposals are not inconsistent; that he never formally proposed to integrate into the Oro Valley facility because his statement of intention appended to that application was "merely an expression of interest" and not incorporated into a post-designation integration statement in that proceeding. Widsten Exceptions at 5-6. We find the exception unavailing. The key factor is that on the date set for the filing of integration statements in the Fredericksburg proceeding, Widsten had a pre-existing commitment to the Commission, albeit a self-imposed one, to relocate and integrate elsewhere, thus creating an impermissible conflict. *See Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985) (integration proposals will not be credited if uncertain or indefinite at date set by ALJ for finalizing proposals), *rev. denied*, 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987). In light of the long line of cases clearly disallowing contingent or conflicting integration proposals, we affirm the ALJ's conclusion. *Goodlettsville Broadcasting Co., Inc.*, 8 FCC Rcd 57, 58 (Rev. Bd. 1992) (rejecting integration proposal of principal who had a conflicting integration proposal in another pending Commission proceeding); *see also, e.g., Charisma Broadcasting Corp.*, 8 FCC Rcd 864, 866-67 (1993) (rejecting integration proposal contingent on losing an election to U.S. Congress); *Northern Sun*, 100 FCC 2d at 890-91 (rejecting integration proposal contingent on the Commission's denial of another application).

35. *FC2.* Although the ALJ awarded FC2 100% quantitative integration credit for its proposal to integrate sole general partner Bob A. Roth into the full-time management of the Fredericksburg station as general manager, he excluded FC2 from the final comparative analysis of the applicants due to FC2's receipt of a slight diversification demerit for Roth's involvement in an LPTV permit for Channel 2 at San Antonio, Texas. *I.D.*, ¶ ¶ 138, 141, 152. In view of FC2's comparative coverage advantages over Stonewall and Global, *supra* ¶ ¶ 29-31, and, as amplified below, its superior qualitative attributes, *infra* ¶ ¶ 38-39, we find that the ALJ erroneously omitted FC2 from the ultimate comparative analysis, and, as a consequence, failed to determine that FC2, not Stonewall, is the superior applicant.

36. Global, TexStar, and Stonewall except to the award of 100% integration credit to FC2 arguing that its limited partnership agreement fails to adequately insulate limited partner B.J. McCombs; that McCombs may become active in the partnership through the participation of his agents or employees; and that it is unlikely that Roth will refrain from communicating with McCombs regarding the day-to-day affairs of the partnership in view of their long-standing personal and business relationships. Global Exceptions at 33-39; TexStar Exceptions at 27-29; Stonewall Exceptions at 14-17. The exceptors assert that a provision of FC2's limited partnership agreement permitting the general partner to contract for services with individuals or entities connected to the limited partner fails to comport with the guidelines of *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986), thus requiring the attribution of McCombs' 80% equity interest. TexStar further contends that the agreement fails to specifically constrain the limited partner from voting on the removal of the general partner. TexStar Exceptions at 28.

37. We disagree. FC2's partnership agreement contains the full complement of insulation safeguards required by the Commission's *Attribution Orders* including prohibitions against the limited partner from taking part in the conduct of the partnership business, communicating with the general partner about the business, or serving as an employee, contractor or agent of the partnership. The agreement also contains a provision barring the limited partner from voting to remove the general partner unless "consistent with applicable law." FC2 Exh. 1 at 35. According to FC2, Texas law grants no removal authority to limited partners

absent express provision in the partnership agreement. FC2 Reply Exceptions at 6-7. In view of the agreement's apparent conformance with the Commission's attribution standards, the exceptors' hypothetical notions on how its provisions might potentially be employed to circumvent the insulation provisions is wholly speculative and therefore insufficient to support attribution of the passive interest and associated reduction of FC2's quantitative credit. We further deny the exception that Roth and McCombs' friendship and other business associations provide an independent basis for attributing McCombs' interest. *See Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721, 721-22 (1991) (limited partnership interests not attributed where limited partners were friends and business associates of general partner), *remanded on other grounds sub nom. Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992) (further subsequent history omitted).[5] Because we have found that McCombs' interests are not attributable, we correspondingly deny the exceptors' assertion that McCombs' media interests should be factored into the assessment of a diversification demerit against FC2. *See Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-35 (1986).

38. *Qualitative Evaluation.* Operating under the assumption that the ALJ correctly awarded Global and Stonewall full quantitative credit,[6] we must compare the attributes of Global, Stonewall, and FC2 to determine the comparatively superior applicant under the integration criterion. None of the three benefit from minority participation, and the credit previously accorded Global and Stonewall for female integration is disallowed. *See Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992). Because FC2 and Stonewall merit a substantial preference over Global for their principals' local residence and civic involvement, Global's proposal, which offers only future residence and broadcast experience, is clearly third in the qualitative comparison. *I.D.*, ¶ ¶ 126, 152. *See, e.g., Ronald Sorenson*, 6 FCC Rcd 1952, 1953-54 (substantial preference received under combined local residence/civic involvement criterion outweighs credit for broadcast experience), *recon. dismissed*, 6 FCC Rcd 6901 (1991); *Eugene Walton*, 6 FCC Rcd 6071, 6078 (Rev. Bd. 1991 (promise to move to community of lesser weight than present service area residence) (subsequent history omitted).

39. The *I.D.* awarded FC2 substantial qualitative integration credit for general partner Roth's 65-year residence within the Grade B contour and his "impressive record" of civic participation. *I.D.*, ¶ ¶ 76-77, 138. A further slight enhancement was granted for Roth's "extensive" broadcast experience since 1946. *Id.* at ¶ ¶ 72-74, 138. Stonewall is a two-tier corporation with three equal voting shareholders, Robert N. Simmons, Marian R. Nixon, and Marquis E. Whittington. *Id.* at ¶ 87. The ALJ found that Stonewall's integration proposal is substantially enhanced by Nixon's life-long Fredericksburg residence and active civic involvement; moderately enhanced by Whittington's service area residence (17 years) and (limited) civic participation, and further slightly enhanced by his promise to move to Fredericksburg; and is moderately enhanced by Simmons' four-year service area residence and (minimal) civic participation, and further slightly enhanced by his broadcast experience and promise of future local residence. *Id.* at ¶ ¶ 103, 109-13, 115-21, 147. In the absence of a comparison of Stonewall and FC2's proposals by the ALJ, we find that although they are both impressive on the combined local residence/civic involvement factor, FC2's proposal is nevertheless preferred due to its 100% general partner's longer residence and greater civic involvement than that of Stonewall's voting stockholders, only 67% of which possess a relatively substantial local background (Nixon and Whittington). *See generally Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558-59 (1991) *aff'd by judgment*, 961 F.2d 963 (D.C. Cir. 1992); *see also, e.g., Ronald Sorenson*, 6 FCC Rcd at 1954 (where both applicants have long-term residence, applicant with greater and continuing civic involvement prevails); *Safe Broadcasting Corp.*, 6 FCC Rcd 6548, 6551 (Rev. Bd. 1991) (significantly longer service area residence is preferred over shorter residence in community of license) (subsequent history omitted); *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 885, 886 (Rev. Bd. 1991) (longer life-long residence prevails over shorter life-long residence) (subsequent history omitted). While the two applicants are close, even if they were adjudged equal under this factor, FC2's superior broadcast experience would be enough to tip the comparative scales in that applicant's favor. *See Harry S. McMurray*, FCC 93R-17, slip op. at 8 ¶ 24, released May 14, 1993 (broadcast experience dispositive; applicant with quantitatively and qualitatively superior experience prevails); *Threshold Communications*, 7 FCC Rcd 4554, 4556 (Rev. Bd. 1992) (same); *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9, 10 (Rev. Bd. 1988) (same). Accordingly, FC2 receives a slight preference under the integration criterion.

FINAL EVALUATION

40. FC2 receives a slight-to-moderate preference under the comparative coverage factor and a further slight preference under the integration criterion over its nearest competitors, Stonewall and Global. *See supra* ¶ ¶ 29-31, 39.

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[5] Because the *Bechtel* court has not yet reviewed the Commission's latest *Anchor* order, *see also Flagstaff Broadcasting Union v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992), Board Member Blumenthal concurs only tentatively in the language of this paragraph. *See also, e.g., Harry S. McMurray*, FCC 93R-17, released May 14, 1993 (separate statement).

[6] Because we ultimately find that FC2's proposal is comparatively preferred to Stonewall's on grounds of greater qualitative enhancements to integration and superior coverage, *infra* ¶ 40, we need not resolve the exceptions regarding Stonewall's financial proposal, the effectuation of its integration proposal, or the soundness of its articles of incorporation. Global Exceptions at 6-13; TexStar Exceptions at 37-41; FC2 Exceptions at 30-36; Widsten Exceptions at 8-15. We observe only that applicant financier and 70% non-voting stockholder Rebecca Lambert's function of reviewing and paying the applicant's bills, in addition to her receipt of frequent reports from the voting stockholders on the application's progress, would appear sufficient to impute active status to her interest. *I.D.*, ¶ ¶ 96-98; Tr. 1495-96, 1576-92, 1650, 1677-78; FC2 Exh. 18. *See Richardson Broadcast Group*, 7 FCC Rcd 1583, 1587 ("the payment of bills is ordinarily a management function"; limited partner's involvement therein warrants further hearing to determine whether sufficiently insulated) (subsequent history omitted); *Isis Broadcast Group*, 7 FCC Rcd at 5131-32 (interest of non-voting stockholder attributed where he controlled applicant's funding including the payment of bills); *see also generally Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1233-34 (D.C. Cir. 1993).

These preferences are partially offset by FC2's slight diversification demerit. *See supra* ¶ 24. Generally, of the three factors underlying the comparative evaluation, diversification is of greatest significance and will prevail over any other equal or lesser comparative preference. *See Christian Broadcasting*, 99 FCC 2d at 583-84. Here, however, we conclude that FC2's slight-to-moderate coverage advantage combined with its slight integration edge are sufficient to outweigh the slight diversification demerit, which is premised only on FC2's LPTV station interest. *Accord Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510, 1513 n.25 (1991) (subsequent history omitted); *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 469-70 (1982), *recon. denied*, FCC 83-30, released January 25, 1983; *Cleveland Television Corp.*, 91 FCC 2d 1129, 1143 (Rev. Bd. 1982), *rev. denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984). Thus, FC2 is the superior applicant under the standard comparative issue and its application for the Fredericksburg station should therefore be granted.

41. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Global Information Technologies, Inc. on November 22, 1989, December 14, 1989, and June 4, 1990; by Hal S. Widsten on August 8, 1989, September 8, 1989, and November 16, 1989; and by Stonewall Broadcasting, Inc. on February 16, 1993, ARE GRANTED, and the corresponding amendments ARE ACCEPTED.

42. IT IS FURTHER ORDERED, That the request for official notice filed by TexStar Communications, Ltd. on July 21, 1989, IS GRANTED; that the motion for leave to file supplement to exceptions filed by TexStar Communications, Ltd. on August 31, 1992, IS DENIED, and the supplemental exceptions ARE DISMISSED; that the Mass Media Bureau's motion to dismiss comments of Stonewall Broadcasting, Inc. and Global Information Technologies, Inc. filed on August 25, 1992, IS DENIED; and that the contingent motion to reopen the record filed by Fredericksburg Channel 2 on September 16, 1992, IS DENIED.

43. IT IS FURTHER ORDERED, That the application of Fredericksburg Channel 2 (File No. BPCT-870212KP) for a construction permit for a new television station at Fredericksburg, Texas, IS GRANTED, and that the applications of Global Information Technologies, Inc. (File No. BPCT-861219KG), TexStar Communications, Ltd. (File No. BPCT-870212KM), Frontier Broadcasting, Inc. (File No. BPCT-870212KN), Hal S. Widsten (File No. BPCT-870212KT), and Stonewall Broadcasting, Inc. (File No. BPCT-870212KU) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-135

In re Applications of

THE PETROLEUM V. NASBY CORPORATION — File No. BRH-890601VB

For Renewal of License of
Station WSWR(FM)
Shelby, Ohio

THE PETROLEUM V. NASBY CORPORATION — File Nos. BTCH-921019HX and BTCH-921019HY

For Transfer of Control of
Station WSWR(FM)
Shelby, Ohio

HEARING DESIGNATION ORDER AND NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE

Adopted: May 10, 1993; Released: June 14, 1993

By the Commission:

1. The Commission has before it: (1) the above-captioned license renewal application for Station WSWR(FM), Shelby, Ohio, filed on June 1, 1989, by The Petroleum V. Nasby Corporation ("Nasby");[1] (2) an application filed October 19, 1992, for consent to transfer control of Nasby from Thomas L. Root ("Root") and Kathy G. Root, and Thomas L. Root, Custodian for Thomas P.J. Root and Leslie J.L. Root to Kathy G. Root and Kathy G. Root as Custodian for Thomas P.J. Root and Leslie J.L. Root; Arlene M. Geer, Trustee for Thomas P.J. Root, Leslie J.L. Root and Travis S.C. Root; Joanne L. and Thomas F. Root, Jointly; and (3) an application filed October 19, 1992, for transfer of control of Nasby from Joanne L. Root and Thomas F. Root, Jointly to Ginsburg, Feldman & Bress Chartered.

2. Based upon the information provided in the first pending application for transfer of control, as of June 1, 1989, Thomas L. Root held 178.25 shares (39.30%) of Nasby stock in his own name and held 50 shares (11.10%) as custodian for his children. In June 1989 Root transferred 70.25 shares of the Nasby stock to his parents, Joanne L. Root and Thomas F. Root, for consideration. Also in June 1989, Root transferred 50 of his own shares to the corporation as treasury shares for retirement of a corporate debt which he had assumed and transferred the balance of his individually owned and custodial stocks as gifts to his minor children. Simultaneously, his wife transferred 25 shares of her stock as gifts to her children, giving her a balance of 33 shares in her own name and 50 shares as custodian for her minor children. These transactions are the subject of the first transfer of control application filed October 19, 1992, which seeks *nunc pro tunc* approval of the 1989 stock transfers.[2] Overall the transactions reflect a transfer of more than 50% of Nasby. The ownership changes were reflected in Nasby's 1990 annual ownership report filed on April 27, 1990. The second transfer of control application contemplates the prospective transfer of 70.25 shares of Nasby stock from Root's parents to Ginsburg, Feldman & Bress Chartered, Root's attorneys, and is contingent upon approval of the prior transfer of control.

3. Root became a director and secretary of Nasby in May 1984. He resigned from these positions effective March 21, 1990, and the Commission was so informed by amendment to the Nasby renewal application dated April 26, 1990.

4. Prior to his resignation from positions with Nasby, Root was the attorney responsible for prosecuting applications for FM construction permits of partnerships formed by Sonrise Management Services, Inc. (Sonrise). Root's involvement in Sonrise resulted in his being indicted for violation of federal and state statutes and ultimately his disbarment from the practice of law. A 33 count federal indictment was filed in the United States District Court for the District of Columbia on March 21, 1990 (Case Nos. 90-0134 and 90-0136). Root entered into a plea agreement with the government, and pleaded guilty to two counts of altering, forging and counterfeiting public records, and three counts of wire fraud. Root was also indicted in the United States District Court for the Southern District of Illinois on June 21, 1990. The Illinois criminal action was consolidated with the original action before the United States District Court for the District of Columbia, and Root entered into a further plea agreement whereby he pleaded guilty to one count (causing the interstate transportation of stolen property), on September 11, 1990. On January 17, 1992, Root was sentenced to a term of 33 months in federal prison where he is now serving his sentence.

5. In North Carolina on October 26, 1990, Root pleaded no contest to 90 counts of selling an unregistered security (a violation of G.S. 78A-24); 90 counts of failing to register as a securities dealer (a violation of G.S. 78A-36); 90 counts of securities fraud (a violation of G.S. 78A-8(2)); 90 counts of securities fraud (a violation of G.S. 78A-8(3)); and 4 counts of conspiracy. On August 28, 1992, Root was found guilty on all counts and sentenced to 15 years in prison to be served concurrent with his federal sentence. *See State [of North Carolina] v. Thomas L. Root* (Case Nos. 90-CRS-8496 through 8499 and 90-CRS-9155 through 9161).

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[1] The renewal application was initially granted on April 27, 1990. Public Notice of the grant was released on May 3, 1990. However, by letter dated May 31, 1990, the Chief, Audio Services Division, set aside the grant.

[2] The ownership interests set forth in Exhibit A of the first pending transfer of control application are at variance with the interests set forth in an ownership report filed June 2, 1989, by Nasby, with the Commission. We are relying upon the ownership information in the transfer of control application because that is the application which is before us and because it is most recent.

6. Additionally, a 47 count superseding indictment was filed on January 10, 1991, in the Supreme Court for Pinellas County, Florida (Case No.13295 CFANO) charging Root with one count of racketeering and one count of conspiracy to commit racketeering in Florida (violations of F.S. 895.03(03)); one count of organized fraud in Florida (a violation of F.S. 817-036); two counts of organized fraud in Florida (a violation of F.S. 817.034(4)(a)); one count of unlawful offer or sale in Florida of an investment contract of an aggregate value exceeding $50,000 from 5 or more persons (a violation of F.S. 517.302(2)); 20 counts of fraud in connection with the offer or sale of securities within Florida (violations of F.S. 517.301 and F.S. 517.302); 20 counts alleging the unlawful offer or sale in Florida of an unregistered security (violations of F.S. 517.07 and F.S. 517.302); and one count of grand theft in the first degree (a violation of F.S. 812.014(1) and 2(a)). On June 22, 1992, Root pled no contest to all counts (except the grand theft count which was dismissed). Root was found guilty on all counts (except the dismissed grand theft count) and was sentenced to 15 years in prison to be served concurrent with, and coterminous to, his North Carolina sentence.

7. In our *Policy Regarding Character Qualifications in Broadcast Licensing* (*"1986 Character Policy Statement"*), 102 FCC 2d 1179, 1196-97 (1986), we stated that we would consider felony criminal convictions involving fraudulent conduct and other fraudulent misconduct before government agencies in our character determinations. In our *1990 Character Policy Statement*, 5 FCC Rcd 3252 (1990), we expanded on the *1986 Character Policy Statement* and indicated that evidence of any felony conviction, not just those involving fraud, are relevant to our evaluation of an applicant's or licensee's character. Our consideration includes the misconduct of those whose ownership interests are cognizable under our multiple ownership rules and where the individual has the potential to influence or control the operations of a station. *Id.* at 1205-6. Here Root was an officer and director as well as controlling shareholder of more than 50% of the stock of Nasby. The misconduct which resulted in his convictions both in federal and state courts occurred while he was a principal of Nasby. Additionally, Root's misconduct which resulted in his federal conviction involved, *inter alia*, the creation and forging of a counterfeit order of an Administrative Law Judge of the Commission and submitting a counterfeit FAA "No Hazard" determination in a Commission proceeding. This misconduct clearly violated the integrity of the Commission's licensing processes. It is clear that, pursuant to our character policy, Root's misconduct must be considered in determining Nasby's entitlement to a renewal of its license. The fact that Root resigned as an officer and director prior to his actual convictions does not moot their significance as they impact on Nasby's qualifications. *See TV 9, Inc. v. FCC*, 495 F.2d 929, 939-40 (D.C. Cir. 1973), *cert. denied* 419 U.S. 986 (1974). Accordingly, we will specify an appropriate issue.

8. Consideration of the pending transfer of control application seeking *nunc pro tunc* approval of Root's transfer in June 1989 of all of his shares of stock in the licensee corporation as gifts to his minor children and in return for consideration from his parents and of his wife's transfer of stock to their children is initially dependent upon a determination as to whether Nasby is entitled to a renewal of its license. Absent renewal of the Nasby license for WSWR(FM), there is no license for which the requested transfers of control can be considered. *Cf. Jefferson Radio Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). In the event that it is determined that grant of Nasby's renewal is warranted, we will then consider whether *nunc pro tunc* approval of the otherwise apparently unauthorized transfer of control of Nasby is in the public interest. Accordingly, an appropriate issue will be specified. Action on the second transfer application will be deferred contingent upon resolution of the specified issues.

9. On the basis of the foregoing, the Commission is unable to conclude that The Petroleum V. Nasby Corporation possesses the basic qualifications to obtain a grant of its renewal application. Additionally, on the basis of the foregoing, the Commission is unable to find that the public interest will be served by granting the pending transfer of control applications.

10. Accordingly, IT IS ORDERED, that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned applications of The Petroleum V. Nasby Corporation for renewal of license of Station WSWR(FM), Shelby, Ohio and for transfer of control ARE DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.

2. To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.

3. To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

4. To determine, in light of the foregoing, whether approval of the pending applications seeking to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

11. IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal application for Station WSWR(FM), it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed $250,000, shall be issued against Nasby for willful and/or repeated violations of Section 310(d) of the Communications Act of 1934, as amended, and/or Section 73.3540 of the Commission's Rules.

12. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

13. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the Mass Media Bureau proceed with the initial presentation of the evidence with respect to issue 1, and the applicant then proceed with its evidence on issues 1-3, and Nasby have the burden of proof with respect to all issues.

14. IT IS FURTHER ORDERED, that, to avail itself of the opportunity to be heard, the applicant shall, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *HDO*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified.

15. IT IS FURTHER ORDERED, that the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

16. IT IS FURTHER ORDERED, that the Secretary of the Commission send a copy of this *HDO* by *Certified Mail-Return Receipt Requested* to Nasby.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-156

In re Applications of

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC., d/b/a TRINITY BROADCASTING NETWORK — File No. BRCT-911129KR

For Renewal of License of Station.
WHSG(TV), Monroe, Georgia

and

GLENDALE BROADCASTING COMPANY — File No. BPCT-920228KE

For Construction Permit
Monroe, Georgia

HEARING DESIGNATION ORDER

Adopted: May 26, 1993; Released: June 14, 1993

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Service Division, acting pursuant to delegated authority, has before it the above-captioned application for the renewal of license of station WHSG(TV), filed by Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network, (Trinity) and the mutually exclusive application of Glendale Broadcasting Company (Glendale) for a new commercial television station to operate on Channel 63, Monroe, Georgia.[1]

2. The transmitter site proposed by Glendale is 262.4 kilometers (km) from the reference point for Channel 63 allocated to Montgomery, Alabama, making Glendale's site short-spaced by 18.4 kms.[2] Accordingly, an issue will be specified to determine whether circumstances exist which would warrant a waiver of Section 73.610 of the Rules.

3. No determination has been reached that the tower height and location proposed by Glendale would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine with respect to Glendale Broadcasting Company:

   (a) if circumstances exist which would warrant a waiver of Section 73.610 of the Commission's Rules.

   (b) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1 (b).

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[1] The issues raised by Glendale in its petition to deny the license renewal application of Trinity have been considered by the Commission and designated for hearing in connection with the license renewal application of Trinity Broadcasting of Florida, Inc., for Channel 45, Miami, Florida. *See Trinity Broadcasting of Florida, Inc.*, FCC 93-148, released April 7, 1993. Because the issues will be resolved in connection with the Miami renewal, they will not be specified or adjudicated in this proceeding. See *RKO General, Inc.*, 54 RR 2d 717 (1983). However, as the Commission stated when it designated the issues for hearing, if they are resolved against National Minority Television, Trinity Broadcasting Network or its affiliates, the Commission will determine what actions are appropriate in connection with the stations licensed to these other entities. Accordingly, any grant of Trinity's renewal application in the instant proceeding shall be subject to whatever action the Commission deems appropriate in light of the final resolution of issues a and b as specified in the *Hearing Designation Order* in the Miami proceeding, MM Docket No. 93-75. The Administrative Law Judge may proceed with all other aspects of the instant comparative renewal hearing.

[2] Glendale submitted an amendment to its application on March 5, 1993, after the date for filing amendments as a matter of right, March 9, 1992. Trinity filed on May 10, 1993, an objection to the amendment stating that Glendale had not shown good cause for filing the amendment. However, we note that the amendment was filed by Glendale changing its tower site in order to address objections from the Federal Aviation Administration (FAA) to its original site. We believe that Glendale's efforts to be cooperative and comply with the air hazards concerns of the FAA is good cause for acceptance of the amendment. Accordingly, the amendment will be accepted with no comparative advantage occuring to Glendale.

7. IT IS FURTHER ORDERED, That Glendale Broadcasting Company's March 5, 1993 amendment IS ACCEPTED, for good cause demonstrated with no comparative advantage accuring to Glendale.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, Room 700, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMSC Subsidiary Corporation	File Nos. 7/8/9-DSS-MP/ML-90 20-DSS-MP/ML-92 21-DSS-EXT-92 33-DSS-EXT-92

Applications to Modify Space Station Authorizations in the Mobile Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1993; Released: June 14, 1993

By the Commission:

I. INTRODUCTION

1. AMSC Subsidiary Corporation (AMSC) has applied to modify its three space stations in the Mobile-Satellite Service (MSS).[1] By this order, we authorize AMSC to make certain modifications to its AMSC-1 space station, consistent with the terms and conditions described herein. Consideration of any modifications to AMSC-2 and AMSC-3 are deferred.

II. BACKGROUND

2. In July 1986, the Commission allocated 27 MHz of spectrum in the upper L-band for MSS,[2] to be shared with the Aeronautical Mobile-Satellite Service (AMSS(R)).[3] The 1549.5-1558.5 MHz and 1651-1660 MHz bands were allocated on a co-primary basis to MSS and AMSS(R), with AMSS(R) having priority and real-time preemptive access in these bands. The 1545-1549.5 MHz and 1646.5-1651 MHz bands were allocated to MSS on a secondary basis with AMSS(R) primary in these bands.[4]

3. In August 1989, the Commission authorized AMSC to construct, launch and operate an MSS-AMSS(R) system comprised of three space stations in the allocated frequencies.[5] We authorized AMSC to offer, on a common carrier basis, a variety of domestic communications services, including land, aeronautical and maritime mobile satellite services. The three satellites in AMSC's system were assigned to the 62^0 W.L., 101^0 W.L. and 139^0 W.L. orbital locations. For mobile operations (*i.e.*, transmissions between the mobile user terminals and the satellites) at each of these locations, the Commission authorized AMSC to pursue full use of the upper L-band, pursuant to the U.S. domestic allocation and subject to international coordination. For feeder link operations (*i.e.*, transmissions between the satellites and fixed hub earth stations in the fixed-satellite service), AMSC was authorized to use: (a) at 101^0 W.L., 100 MHz (both uplink and downlink) in the 10.70-10.95/13.00-13.15/13.20-13.25 GHz bands (11/13 GHz),[6] and (b) at 62^0 W.L. and 139^0 W.L., the 11.7-11.8 GHz and 14.0-14.1 GHz bands (12/14 GHz). For all feeder link spectrum, AMSC was required to employ full frequency reuse (*i.e.*, dual polarization) in each uplink and downlink segment.

4. In authorizing AMSC to establish and operate a combined MSS-AMSS(R) system, AMSC's authorizations were conditioned on AMSC's ability to comply with the allocation requirement that AMSS(R) have priority and real-time preemptive access to the whole bandwidth. If AMSC's system could not meet reasonable and necessary technical requirements and system specifications for AMSS(R), AMSC would be required to operate on a secondary basis to the AMSS(R) communications provided on a separate system, if one were authorized. The overall system design, whereby access to and operation of the network would be controlled primarily by a Network Operation Center (NOC) using a Priority Demand Assignment Multiple Access (PDAMA) scheme rather than by incorporating control mechanisms on the spacecraft itself, was found to be a reasonable approach for a combined MSS-AMSS(R) system. Nonetheless, AMSC had not adequately described in its application how AMSS(R) access and interference protection would be ensured due, to a large extent, to the ongoing dialogue within the domestic and international aviation communities to develop technical standards. Thus, given the Commission's responsibility to promote the safety of life and property through the use of radiocommunications, *see, e.g.*, 47 U.S.C. § 151, the Commission stated it would continue to oversee the planning and implementation process of a generic MSS-AMSS(R) system. It also required AMSC to file, within ten months of the release of the authorization order, a report that identified any issues or problems concerning reasonable and necessary AMSS(R) technical requirements and system specifications. AMSC complied with this requirement.[7]

5. The Commission also required AMSC to provide or to revise certain technical information consistent with the terms and conditions contained in the authorization order.

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[1] The licenses were originally granted to American Mobile Satellite Corporation, but were subsequently transferred to AMSC Subsidiary Corporation, a wholly-owned subsidiary of American Mobile Satellite Corporation.

[2] Report and Order, General Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 1825 (1986) (hereinafter Allocation Order).

[3] AMSS(R) is a mobile satellite service in which mobile earth stations are located on board aircraft. Spectrum allocated for AMSS(R) is reserved for aeronautical communications related to the safety and regularity of flights. *See* 47 C.F.R. § 2.1 (definitions). Survival craft and emergency position-indicating radiobeacon stations may also participate in this service. *Id.*

[4] The L-band allocation for MSS was affirmed on reconsideration with a minor modification to clarify priority and preemptive access. 2 FCC Rcd 6830 (1987); 4 FCC Rcd 6029 (1989). *See* 47 C.F.R. § 2.106, footnote US308.

[5] Memorandum Opinion and Order, 4 FCC Rcd 6041 (1989) (AMSC Authorization Order). *See also* Final Decision on Remand, General Docket No. 84-1234, 7 FCC Rcd 266 (1992).

[6] These bands are allocated for domestic fixed-satellite service use pursuant to an allotment plan and associated procedures. *See* ITU, Space WARC Final Acts, Appendix 30 B (Geneva, 1988).

[7] *See* Report of AMSC's Chief Scientist on Matters Involving the Provision of Aeronautical Mobile Satellite (R) Service (filed June 4, 1990).

Specifically, we required AMSC to file the following information within 120 days of release of the authorization order: (a) revised feeder link spacecraft antenna coverage patterns;[8] (b) revised transponder plan;[9] (c) revised link budgets;[10] (d) descriptions of NOC, PDAMA, and mobile terminal interrelationships; (e) revised spacecraft beam coverage patterns;[11] (f) identification of the 100 MHz segment (uplink and downlink) at 11/13 GHz to be used for feeder links at 101^0 W.L.; and (g) preliminary plans for earth station and mobile terminal design. AMSC complied with this requirement by filing a modification application encompassing all three satellites in December 1989.

6. In addition to the required information and revisions, AMSC requested authority for several additional system modifications: (a) to operate the feeder links in both the 11/13 GHz and 12/14 GHz bands on 200 MHz of assigned bandwidth using single polarization, (b) to construct all satellites with identical feeder link transmission capability on both 11/13 GHz and 12/14 GHz frequencies, and (c) to construct all satellites to include additional transmission capability in the 1530-1545 MHz and 1626.5-1646.5 MHz bands (lower L-band).[12]

7. After AMSC submitted this modification application, the Court of Appeals for the District of Columbia Circuit remanded to us for further consideration two aspects of the licensing decision that culminated in the grant to AMSC.[13] Our order on remand reaffirmed grant of AMSC's license.[14] In January 1992, shortly after our final decision in the remand proceeding was released, AMSC filed a supplemental modification request for AMSC-1, its satellite that is to operate at 101^0 W.L. AMSC states that this amendment was necessitated by its arrangements with Telesat Mobile, Inc. (TMI), the Canadian L-band mobile satellite licensee, and their spacecraft manufacturers. Pursuant to the AMSC/TMI agreement, the U.S. and Canadian systems are to provide back-up service to the other in the event that one system fails, and AMSC and TMI have arranged for joint procurement of both systems. AMSC states that the joint procurement contract provides for construction of slightly different satellites than those specified in AMSC's initial modification application. Specifically, AMSC seeks to revise AMSC-1's L-band antenna patterns, the feeder link antenna patterns, and the transponder plan.[15] It also states that it no longer seeks to construct each satellite with the capability of operating on the same feeder link frequencies. Finally, AMSC seeks an extension of the required construction completion and launch dates for AMSC-1.[16]

8. In the January 1992 amendment for AMSC-1, AMSC states that it expects to file similar requests for its other two satellites, AMSC-2 (assigned to 62^0 W.L.) and AMSC-3 (assigned to 139^0 W.L.).[17] AMSC has since filed two requests for further extensions of time in which to begin construction of AMSC-2 and AMSC-3.[18] In recent letter to the Commission, AMSC indicates that it plans to modify AMSC-2 and AMSC-3 further in light of its acquisition in bankruptcy of the licenses held by Geostar Positioning Corporation in the radiodetermination satellite service.[19] Finally, on October 20, 1992, AMSC filed an amendment relating to on-station tracking, telemetry and control (TT&C) frequencies on AMSC-1.[20]

9. Comments on AMSC's 1989 modification application were filed by Aeronautical Radio, Inc. and Air Transport Association of America (ARINC-ATA), American Satellite Company d/b/a Contel ASC (Contel ASC)[21] , and Communications Satellite Corporation (COMSAT). Geostar Messaging Corporation (Geostar) filed a petition to deny.[22] AMSC filed a consolidated response and opposition. Geostar filed a reply to the opposition. Comments on AMSC's supplemental modification application were filed by ARINC-ATA, COMSAT, and GTE Spacenet Corporation. Motorola Satellite Communications, Inc. (Motorola) filed a petition to deny. AMSC filed a consolidated response and opposition to these pleadings.

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[8] For both the 11/13 GHz and the 12/14 GHz bands, AMSC was to revise the spacecraft transmit and receive antenna coverage patterns for all three satellite locations; maximum transmit power and maximum e.i.r.p. for each beam; and gain/temperature (G/T) for each receive antenna beam.

[9] AMSC was to revise the frequency plans for the L-to-Ku bands and Ku-to-L bands for all three satellites; polarization for each direction of transmission; telemetry, tracking and control (TT&C) frequency; and the back-haul frequency for network control and polarization plans in the fixed-satellite service feeder link bands between the NOC and the hub stations.

[10] The link budgets for all authorized services, including AMSS(R), in the 1.5-1.6 GHz, 11/13 GHz and 12/14 GHz bands were to be revised.

[11] Under its authorization, AMSC is required to provide service to all fifty states, Puerto Rico, the U.S. Virgin Islands and U.S. coastal areas up to 200 miles. The revised spacecraft antenna beam patterns were to include, as follows: (a) at 62^0 W.L., Puerto Rico and the Virgin Islands, (b) at 101^0 W.L., Hawaii, Puerto Rico and the Virgin Islands, and (c) at 139^0 W.L., Hawaii, Puerto Rico and the Virgin Islands.

[12] In June 1991, AMSC filed an application to add capability in the 1515-1525 MHz and 1616.5-1626.5 MHz frequency bands to its eastern MSS satellite. (File Nos. 15/16-DSS-MP-91). This application is being considered in separate proceedings. (ET Docket No. 92-28/CC Docket No. 92-166).

[13] Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991).

[14] Final Decision, 7 FCC Rcd 266 (1992).

[15] In April 1992, AMSC was granted a waiver pursuant to Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), to allow it to expend up to $32 million for the period ending April 1, 1993 to continue with construction and to incorporate any of the proposed modifications to AMSC-1 as the need arises. *See* letter from Chief, Domestic Facilities Division to Brian B. Pemberton (May 6, 1992).

[16] AMSC subsequently filed a request for further extension of the launch date.

[17] *See* AMSC Request for Minor Modification (January 31, 1992) at 1, n.2.

[18] *See* Public Notice, Report Nos. DS-1226 (August 26, 1992) and DS-1286 (February 24, 1993).

[19] *See* letters from Richard H. Waysdorf and Lon C. Levin to James R. Keegan (August 10, 1992). The Geostar Positioning Corporation licenses involve the same frequency bands as are at issue in ET Docket No. 92-28/CC Docket No. 92-166. *See* note 12, *supra*.

[20] *See* Public Notice, Report No. DS-1252 (November 12, 1992). AMSC has also filed applications for a fixed hub earth station and mobile terminal authorizations. These applications will be considered separately.

[21] Contel ASC has since been merged into GTE Spacenet Corporation.

[22] Since Geostar filed its petition to deny, it has declared bankruptcy and AMSC has purchased its licenses. Nevertheless, to ensure that all outstanding issues are considered in this proceeding, we will consider Geostar's petition as informal comments.

III. DISCUSSION

10. AMSC has filed various modification applications relating to its three satellite system. AMSC seeks to make a variety of technical changes to the satellites and to extend several implementation deadlines. It appears, however, that AMSC's plans for each of the satellites are in varying stages. AMSC is proceeding with construction of AMSC-1 and its plans for the satellite, while continuing to undergo some refinement, are essentially completed. In contrast, AMSC has stated that further modification applications for AMSC-2 and AMSC-3 are forthcoming. These proposed modifications will apparently involve additional frequency bands and possibly other major changes.[23] Consequently, we will consider here only modifications pertaining to AMSC-1, including the milestone extension requests.[24] We will also consider those comments that pertain to AMSC's system in general. We will not consider any modifications to AMSC-2 and AMSC-3 in this order. Rather, we will address all modification requests for these satellites, including AMSC's recent request for additional time in which to begin construction of these satellites, in a separate order.

A. General Concerns

11. Although the commenters raise a number of issues regarding specific modification requests, several also express more general concerns regarding the overall planning and implementation process of the MSS-AMSS(R) system. We discuss these first.

1. Extension of Implementation Milestones

12. AMSC requests extensions of the construction completion and launch dates for AMSC-1 from January 1993 and July 1993 until April 1994 and December 1994, respectively.[25] AMSC states that while it has committed over $100 million towards construction of this satellite, additional time is needed due to the joint procurement of this satellite with TMI. According to AMSC, the joint procurement process, which was finalized in November 1990, slowed implementation of AMSC-1 by creating the need to coordinate every decision with TMI. AMSC also states that joint procurement complicated construction negotiations with the spacecraft manufacturers. ARINC and Motorola argue that AMSC has not demonstrated good cause for the extensions since its decision to procure its satellites jointly with TMI was not a circumstance beyond AMSC's control.

13. The implementation schedule included in every domestic satellite license issued by the Commission is designed to prevent orbital locations from being held by licensees who have not yet decided whether to proceed with their plans.[26] Such "warehousing" hinders the availability of service to the public by blocking the entry of entities willing and able to proceed immediately with implementation of other space stations. Consequently, milestone extensions are generally granted only when the delay in implementation is due to circumstances beyond the control of the licensee. Significantly, however, in every instance where the Commission has denied an extension request, construction of the satellite either had not begun or was not continuing, raising questions regarding the licensee's intention to proceed.

14. AMSC has begun construction of AMSC-1 and is continuing with implementation. AMSC signed a construction contract with Hughes Aircraft Company in July 1990 and, in December 1990, it signed a contract with TMI, the Canadian MSS licensee, for the joint procurement of AMSC's and TMI's satellites.[27] AMSC has finalized the basic technical parameters for AMSC-1, as evidenced in its detailed December 1989 and January 1992 modification requests. Further, international coordination of AMSC-1, including agreement on specific operating parameters, has been progressing. AMSC has been an active participant in this process.[28] The additional 18 months requested to complete construction of and to launch AMSC-1 is not excessive.[29] Thus, even if AMSC's decision to procure a mobile satellite system jointly with TMI is not considered a circumstance beyond its control[30] grant of AMSC's extension request would not be contrary to our warehousing policy.[31]

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[23] *See* notes 12 and 19, *supra*.

[24] We will not, however, consider the proposed modifications pertaining to AMSC-1's on-station TT&C operations. We have not been able to review fully all issues pertaining to AMSC's October 1992 TT&C amendment. Because these issues are separable from AMSC's other proposed modifications, we will address the on-station TT&C proposal in a forthcoming order.

[25] In its January 1992 amendment, AMSC had requested that the launch date be extended until September 1994. AMSC subsequently filed a further request for a launch extension until December 1994. No comments or oppositions were filed with respect to the further request.

[26] *See* MCI Communications Corp., 2 FCC Rcd 233 (1987). *See also* American Telephone & Telegraph Co., FCC 87-239 (released July 29, 1987) and GE American Communications, Inc., DA 92-976 (Com. Car. Bur., released Aug. 11, 1992).

[27] The Commission has traditionally viewed the execution of a non-contingent construction contract as fulfilling the construction commencement condition of domestic satellite licenses. *See, e.g.*, letters from Chief, Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990), to Ford Aerospace Satellite Services Corp. and Satellite Transponder Leasing Corp. (Jan.21, 1987), and to Alascom, Inc. and National Exchange Satellite, Inc. (Feb. 16, 1990).

[28] *See* Final Decision on Remand, 7 FCC Rcd 266 (1992), at paras. 25-34; Tentative Decision on Remand, 6 FCC Rcd 4900 (1991), at paras. 47-49 and 79.

[29] ARINC states that AMSC may not have been fully candid with respect to its plans for completing AMSC-1. It asserts that trade press reports as early as June 1989 indicated that AMSC-1 would not be launched until 1994. Even assuming ARINC's claim is true, this would not warrant denying AMSC's extension requests. ARINC does not question that AMSC has begun construction of AMSC in accordance with the milestone date. AMSC timely filed with the Commission its request for extension of the remaining deadlines. Indeed, the request was filed nearly one year before the January 1993 construction completion milestone. AMSC has not violated the terms of its license or Commission policy by filing its extension request when it did.

[30] Motorola and ARINC claim that joint procurement with TMI is a business decision that cannot be used to justify an extension of time. We note, however, that even before AMSC's license was granted, it was contemplated that the U.S. and Canadian systems would provide back-up capacity for each other in the event of failure. Thus, the Commission's decision to grant only one MSS license was based, in part, upon the notion that "[a]ny arrangements for a joint U.S.-Canadian MSS system will also be facilitated by authorizing only one U.S. MSS licensee." Second Report and Order, CC Docket No. 84-1234 (2 FCC Rcd at 485 (1987), n.17. *See also* AMSC Authorization Order, 4 FCC Rcd at 6041, para. 67.

[31] While Motorola argues in its petition to deny that AMSC does not indicate its plans for, or the likelihood of, completing financing for its system, we are not considering AMSC's entire system here. Rather, we are considering only whether the re-

Moreover, grant would further the public interest by allowing new and needed mobile satellite voice services to be made available, through a domestic licensee in the upper L-band, to U.S. customers. Accordingly, AMSC's requests for extensions of the construction completion and launch deadlines for AMSC-1 are granted.

2. Sufficiency of Information

15. ARINC-ATA, which have opposed the Commission's MSS licensing proceedings throughout, claim that AMSC has not provided adequate technical and operational information on how its system will provide priority and preemptive access and interference protection for AMSS(R) communications, including hand-off of AMSS(R) traffic to other systems. Noting that AMSC's use of authorized L-band spectrum is conditioned on its ability to meet aviation's needs pursuant to the authorization order, ARINC-ATA argue that the Commission should require AMSC to file additional information that is fully responsive to the Commission's directives and aviation's requirements before AMSC is authorized to proceed further. COMSAT, the U.S. Signatory to INMARSAT, alleges that some of AMSC's modifications create the prospect of harmful interference between AMSC's and INMARSAT's systems. COMSAT claims that AMSC has the burden to demonstrate non-interference to the INMARSAT system under Article 6 of the international Radio Regulations. Citing the U.S.'s obligation to the INMARSAT global satellite system as evidenced by the International Maritime Telecommunications Act, 47 U.S.C. §§ 751, *et seq.*, and the INMARSAT Convention, COMSAT requests that AMSC's system modifications not be granted until AMSC demonstrates its ability to avoid harmful interference to the INMARSAT system and its existing services.

16. ARINC-ATA raise here many of the same concerns that they raised in the initial licensing proceeding. As discussed above, we recognized at that time that AMSC had not adequately described how priority and preemptive access and interference protection for AMSS(R) would be accomplished. We also recognized that this reflected, to a large extent, the ongoing dialogue within the international and domestic aviation communities regarding technical standards for aeronautical mobile satellite communication systems.[32] That dialogue continues today, as is evidenced most recently in a rulemaking request from the National Telecommunications and Information Administration (NTIA) and the Federal Aviation Administration (FAA).[33] In addition, as was noted in the authorization order, many of the aeronautical requirements of concern to ARINC-ATA (*e.g.*, link budgets, call set-up times, priority schemes, AEEC's ARINC Characteristic 741) can be included in the ground and mobile terminal segments of the network and are not totally determined by the spacecraft design.[34] Although we required AMSC to include with these modification applications a clarification of the interrelationships between the NOC and PDAMA components and the mobile terminals, we recognized that further design details for these system components would have to be developed over a longer period of time.[35] Nonetheless, we believed that AMSC could proceed to finalize the spacecraft construction contract once certain technical modifications pertinent to the satellite design were authorized.[36] Thus, we envisioned two parallel tracks whereby specific technical and operational requirements for the ground and mobile terminal segments would be defined while spacecraft construction progresses. We continue to believe that this approach is the most expeditious and efficient means for developing and implementing the MSS-AMSS(R) system consistent with our statutory responsibility to promote the safety of life and property.[37] We will address other system design issues of concern to the aviation community when acting upon the NTIA/FAA request for rulemaking and AMSC's applications for fixed earth station and mobile terminal authorizations.

17. As for COMSAT's concerns regarding potential harmful interference to the INMARSAT system, AMSC's authorization order for AMSC-1 is appropriately conditioned in this respect.[38] Applicants for domestic satellite systems are not required to demonstrate non-interference to other satellite systems under the international Radio Regulations, as COMSAT seems to suggest, as a prior condition to receiving a license for domestic service.[39] Rather, Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c),

maining implementation milestones for AMSC-1 should be extended. AMSC's intent and ability to proceed with AMSC-2 and AMSC-3 will be considered in a separate order. *See* para. 10, *supra*. Moreover, Motorola's allegation that Hughes has done no more than "design work" for AMSC is flatly refuted by the record, which reflects the detailed technical parameters for the satellite. Accordingly, Motorola has not raised a substantial material question of fact that requires a hearing pursuant to Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988).

[32] AMSC Authorization Order, 4 FCC Rcd at 6041, para. 90.

[33] NTIA and the FAA request us to undertake a rulemaking to adopt a proposed set of capabilities for MSS terminals and fixed earth stations to ensure that priority and realtime preemption requirements are met. NTIA/FAA state that the proposed requirements were developed by the MSS Interagency Group jointly chaired by NTIA and the Commission, with representatives from NTIA, the Commission, the FAA, and the Coast Guard. *See* letter from Associate Administrator, Office of Spectrum Management, NTIA and Manger, Spectrum Engineering Division, FAA to Chief, Common Carrier Bureau (January 14, 1993). This letter was treated as a Petition for Rulemaking. *See* Public Notice, Report No. 1937 (May 5, 1993).

[34] *Id.* at para. 93.

[35] *Id.* at para. 91.

[36] *Id.*

[37] In this regard, we recently completed a rulemaking proceeding to establish type acceptance and licensing procedures for the radio-frequency (rf) component of aircraft earth stations. Amendment of Part 87 of the Commission's Rules to Establish Technical Standards and Licensing Procedures for Aircraft Earth Stations, 7 FCC Rcd 5895 (1992).

[38] Specifically, AMSC is required by Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c), to prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of its space stations in accordance with the international Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement and with Article 8 of the INMARSAT Convention, as requested by the Commission.

[39] AMSC is only conditionally authorized to operate in U.S. coastal areas up to 200 miles subject to the Department of State informing the Commission that the U.S. has fulfilled its obligations under both Article XIV(d) and (e) of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. *See* AMSC Authorization Order, 4 FCC Rcd at 6041, para. 138.

clearly indicates that protection from interference is accomplished through the coordination process which may be completed after a station authorization is granted and which may subject the station authorization to additional terms and conditions as required to effect coordination. Moreover, the burden of resolving potential interference does not rest solely on one party. International Telecommunication Union Radio Regulation RR 1085A emphasizes that the coordination is a two-way process. Indeed, international coordination of AMSC's system with INMARSAT's system and the systems of other countries has been progressing and an agreement may be completed next year.[40]

B. L-band Spacecraft Antenna Coverage Patterns

18. In its December 1989 filing, AMSC revised the L-band spacecraft antenna coverage patterns, as required by its authorization order, to include Hawaii, Puerto Rico and the Virgin Islands for the satellite at 101^0 W.L. The revised patterns include relevant parameters for satellite receiver sensitivity and power capability.[41] In its January 1992 amendment, AMSC proposes to revise further the L-band antenna pattern for AMSC-1 by reducing the number of spot beams from eleven to six. AMSC states that this will reduce the cost and weight of the satellite, increase reliability, simplify the design, and improve antenna sidelobe performance and beam isolation.

19. In comments to the 1989 filing, ARINC-ATA question whether the L-band beam coverage patterns indicate any intent by AMSC to provide service over the ocean areas between the continental U.S. (CONUS) and Hawaii, even though AMSC has not been authorized to provide international service in this area. They also observe that although AMSC has claimed the frequencies can be reused to serve all its customers, the beam patterns suggest that actual frequency reuse will depend on traffic demand patterns. COMSAT alleges that AMSC's L-band antenna coverage patterns hinder coordination because they are aimed at offshore points. COMSAT suggests that the L-band coverage should be aligned to land mass areas in order to reduce service area overlap with the INMARSAT system and to improve antenna discrimination toward other regions.[42]

20. We find that AMSC has provided a reasoned and detailed analysis of the competing factors underlying its design decisions in this area. These factors include intersystem interference potential, antenna size, gain, service area coverage, frequency reuse and cost. Further, the parameters given for the L-band spacecraft antenna coverage patterns provide adequate information for coordination purposes. Actual values for frequency reuse and adjustments to satellite parameters, if any, depend on the outcome of the coordination process. We also recognize that AMSC has not requested authority to provide international service in ocean areas between CONUS and Hawaii. Indeed, AMSC's January 1992 amendment indicates that AMSC-1's Hawaii-Alaska beam will not have sufficient antenna gain to support service over the ocean areas between Hawaii and CONUS. We therefore grant AMSC authority to modify the L-band spacecraft antenna coverage patterns as proposed.

C. Ku-band Spacecraft Antenna Coverage Patterns

21. The feeder link spacecraft beam parameters for both the 11/13 GHz and 12/14 GHz bands were revised in AMSC's December 1989 modification applications for all three satellites. The revised parameter values for Ku-to-L band, L-to-Ku band and Ku-to-Ku band transponders include relevant parameters for satellite receiver sensitivity and transmit power capability. In its January 1992 amendment, AMSC proposed to revise further the feeder link patterns for AMSC-1 at 11/13 GHz.

22. While we will not grant any modifications to AMSC-2 and AMSC-3 here, AMSC's request to modify the beam parameters of AMSC-1 is consistent with its original plan to serve the fifty states, Puerto Rico and the U.S. Virgin Islands. No commenter has raised interference concerns with respect to AMSC-1's beam parameters. The technical parameters of the revised 11/13 GHz pattern are similar to those proposed in the December 1989 filing and continue to fall within the allotment plan envelope.[43] Thus, we will allow AMSC to proceed with the proposed Ku-band spacecraft beam parameters for AMSC-1.

D. Transponder Plan

23. AMSC's December 1989 filing provided a revised transponder plan that describes: (a) L-to-Ku band and Ku-to-L band frequency plans for all three satellites; (b) polarization for each direction of transmission; (c) TT&C frequencies; and (d) back-haul frequency and polarization plans between the network operating center (NOC) and the hub earth stations. In its January 1992 application, AMSC amended several aspects of its transponder plan for AMSC-1.[44] The revised plan allows each of the spot beams to use any of the authorized L-band frequencies. It also allows any of the L-band frequencies in any of the spot beams to be uniquely connected via the Ku-band feeder link frequency.[45]

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[40] COMSAT and ARINC-ATA suggest several specific changes to AMSC's system design (*e.g.*, reduce the coverage pattern over the coastal area) in order to facilitate the coordination process. Although a number of options are being pursued in the ongoing coordination process, public disclosure of negotiation strategy regarding specific options would not serve U.S. interests.

[41] AMSC also requested to revise the L-band antenna patterns for AMSC-2 and AMSC-3. These requests will be considered in a separate order. *See* para. 10, *supra*.

[42] COMSAT also claims that satellite antenna sidelobe discrimination, which is needed to assess the frequency reuse potential vis-a-vis other systems, is not identified. AMSC notes that the modification applications contain 29 pages of L-band satellite antenna discrimination contours. AMSC provided similar information for the six antenna beams in its January 1992 amendment.

[43] *See* note 6, *supra*.

[44] AMSC later proposed to conduct on-station TT&C operations for AMSC-1 in different frequencies. This request will be considered in a separate order. *See* note 24, *supra*.

[45] Specifically, in the forward link, the Ku-band receiver output is to be routed to five frequency converter units. These converter units are for the East Coast, Central States, Mountain States, West Coast, and the offshore areas of Alaska, Puerto Rico, Hawaii and the U.S. Virgin Islands. Each frequency converter is to translate a specific 29 MHz portion of the Ku-band receive spectrum to the L-band transmit spectrum of 1530-1559 MHz. The output of each frequency converter unit is to be fed to a network of narrow-band filters and associated electronics. These filter networks (one per beam) are to further divide the

24. In its comments to the December 1989 application, ARINC-ATA raise a number of concerns about the transponder plan. First, ARINC-ATA claim that the transponder plan and the block diagram provided by AMSC are not complete pursuant to Commission requirements.[46] Second, they question why the L-band frequency list indicates a different number of sub-bands (eleven uplink and thirteen downlink sub-bands) than the number of satellite antenna beams for each satellite. Finally, ARINC-ATA note that the transponder plan includes the 1530-1545 MHz and 1626.5-1646.5 MHz bands (lower L-bands) in which AMSC is not authorized to operate. They question how the transponder plan would be altered if AMSC is not authorized to operate on these frequencies.[47]

25. At the outset, we observe that the information AMSC provided for the frequency transponder configuration, including functional block diagram, is sufficient to enable us to authorize the proposed satellite design. AMSC's January 1992 submission provides information as detailed as that filed for other domestic satellite services and as required by Appendix B of the *1983 Processing Order*.[48]

26. Second, ARINC-ATA's concerns about the number of sub-bands and antenna beams relates to AMSC's December 1989 filing, which has been superseded by the amended transponder plan contained in its January 1992 amendment. The transponder configuration proposed in the January 1992 amendment is similar to the one now authorized for AMSC-1 and is significantly different from that proposed in December 1989. As authorized, AMSC-1 employs fixed-frequency pairing of transponders and L-band satellite antenna beams. By modifying the design as proposed to allow transponders to have L-band antenna beam selection with segmented L-band sub-band outputs, AMSC should realize significant operational L-band flexibility to adapt traffic distribution within the system to user demand. Overall management of the system also should be improved in areas such as interference and load control. We believe that this design approach is reasonable given that this system will be used for a new satellite service. Although high demand is projected, specific markets are not yet developed, and the geographic and service concentrations of potential users is unknown at this time. It is also significant that AMSC recognizes that this design will be less complex and costly to implement than would the dynamic design proposed in its December 1989 filing.

27. Last, as addressed in more detail in our discussion of AMSC's general proposal to construct AMSC-1 with lower L-band capability,[49] the inclusion of the lower L-band frequencies in AMSC's transponder plan will not affect the original capability (bandwidth or power) of the authorized upper L-band capacity. Consequently, AMSC is authorized to proceed with the satellites' construction using the revised transponder configuration.

E. Additional Bandwidth for Ku-band Feeder Links

28. As discussed above, we authorized 100 MHz (both uplink and downlink) in the 10.70-10.95 / 13.00-13.15 / 13.20-13.25 GHz bands for 1 feeder links for AMSC's satellite at 101^0 W.L.[50] We also required AMSC to modify its authorizations at a later time to specify the 100 MHz segment in each uplink and downlink band that it would use.[51]

29. AMSC requests that additional bandwidth be assigned for feeder links for AMSC-1 and that it be authorized to operate on a single polarization. Specifically, AMSC requests that 10.75-10.95 GHz be assigned for downlink transmissions with vertical linear polarization and 13.0-13.15 GHz and 13.20-13.25 GHz be assigned for uplink transmissions with horizontal linear polarization. AMSC claims that, if it were to operate the feeder links using dual polarization, harmful intra- and inter-system interference would occur.[52] AMSC also requests the assignment of additional bandwidth for its feeder link operations. By operating with only one polarization on the currently assigned 100 MHz bandwidth and foregoing the additional capacity available by reusing the bandwidth with alternate polarization, AMSC notes that it effectively loses the use of one-half of the overall spectrum capacity available for its use. In order to maintain the currently authorized capacity level, AMSC states that it requires the assignment of 200 MHz of bandwidth at one polarization in each feeder link band.

30. Geostar argues that AMSC's request amounts to no more than an untimely petition for reconsideration of prior Commission action on AMSC's initial application, including the feeder link assignments. Geostar asserts that AMSC has presented no new information that could not have been foreseen by AMSC and upon which the Commission should reconsider its feeder link assignments.[53] In addition, Geostar 5 argues that AMSC has not provided an

29 MHz L-band into eight sub-band transponders. The output of the filter units are to be fed to L-band power amplifiers for transmission to the mobile earth stations in the areas covered by the L-band antenna beams. A similar transponder plan is provided for the return link.

[46] The technical information required in domestic satellite space station applications is contained in Space Station Application Filing Procedures, Appendix B, 49 Fed. Reg. 40256 (September 6, 1983) (1983 Processing Order). *See* 47 C.F.R. § 25.140(a).

[47] No comments were filed with respect to the January 1992 amendment.

[48] *See* note 46, *supra*.

[49] *See* paras. 36-47, *infra*.

[50] AMSC had originally requested the use of 250 MHz in the 11 GHz band and 200 MHz in the uplink band, both using single polarization. For a discussion of the original feeder link authorization, *see* AMSC Authorization Order, 4 FCC Rcd at 6041, paras. 60-81.

[51] AMSC's request for additional bandwidth for AMSC-2 and AMSC-3 will be considered in a separate order. *See* para. 10, *supra*.

[52] AMSC argues, for example, that an L-band uplink signal that is intended for other MSS satellites, but that falls within an AMSC transponder frequency passband, would recur as a cross-polarized, co-channel interfering signal on AMSC's feeder downlink. AMSC states that the polarization isolation available in its feeder links is insufficient to prevent harmful interference in the frequency translated signals. It acknowledges that this problem probably could be resolved through international coordination, but this remedy would result in the U.S. and other satellite systems foregoing the use of a significant amount of L-band spectrum. AMSC estimates that it could lose two L-band channel assignments in order to accommodate one channel assignment in another system.

[53] Geostar also renews concerns that it raised in the initial licensing proceeding about assigning for feeder link use 11/13 GHz frequencies that are part of the international allotment plan without first conducting a rulemaking proceeding.

adequate technical showing to justify the assignment of additional bandwidth. Geostar claims that the cross-polar interference phenomena cited by AMSC is not unique to MSS systems and can be resolved using standard frequency coordination procedures. Finally, Geostar suggests that, based on AMSC's revised transponder plan, the additional feeder link spectrum may actually be needed to support operation on the lower L-band frequencies, which are not authorized for AMSC's system.[54]

31. We believe that AMSC's requests to operate on additional feeder link spectrum and to operate using single polarization have distinct bases. The request to use single polarization stems from difficulties encountered in the international coordination process for AMSC-1. The request for additional spectrum stems from AMSC's proposal to expand its authorized system to include the lower L-band frequencies.[55] Accordingly, we discuss the polarization request here and the additional bandwidth request in the context of acting on AMSC's request to construct AMSC-1 with lower L-band capability. *See* paras. 36-47, *infra*.

32. The difficulties posed by cross-polar interference have become evident during the coordination process that commenced for AMSC-1 after AMSC was granted its license. Because the signal levels in L-band are significantly different in AMSC's and the other systems being coordinated, cross-polar interference has emerged as a significant problem. When the L-band signals from other satellites are translated into the Ku-band of the AMSC system, the cross-polar isolation of the desired and undesired signals in the Ku-band is not sufficient to avoid intersystem interference. Thus, AMSC has reasonable grounds for proposing to use only single polarization on each feeder link band. We therefore authorize AMSC to use single polarization in AMSC-1's assigned feeder link bandwidth at its discretion.

F. TT&C Frequencies During Launch

33. AMSC seeks authority to operate AMSC-1 at 12197.75 MHz and 12195.25 MHz (horizontal polarization) for telemetry transmit and at 14497 MHz (vertical polarization) for command receive during launch and up until commencement of on-station operation.[56] These frequencies are used for domestic fixed-satellite operations. AMSC explains, however, that there are no world-wide telemetry, tracking and control (TT&C) facilities that operate in the 11/13 GHz bands.

34. GTE Spacenet is concerned that one of AMSC's proposed TT&C frequencies during launch will interfere with the telemetry carrier of its GSTAR-1 satellite operating at 103$ W.L. since both transmissions are horizontally polarized. GTE Spacenet requests that AMSC re-assign frequencies to provide at least 500 kHz separation to prevent potential interference.

35. We grant AMSC's request. GTE Spacenet's concerns can be alleviated by AMSC using the other non-adjacent telemetry frequencies. Other short-term time/space sharing options are also available since satellite orbit acquisition time is relatively short and the satellite is in motion relative to GSTAR-1.

G. Lower L-band Frequencies

36. AMSC requests modification of AMSC-1's authorization to allow it to construct, at its own risk, the capability to operate on 1530-1545 MHz (downlink) and 1626.5-1646.5 MHz (uplink). These lower L-band frequencies are adjacent to the upper L-band spectrum assigned to AMSC's system. AMSC has filed a separate application requesting operational authority on these lower L-band frequencies,[57] but that application is not before us at this time, as discussed below.

37. The 1544-1545 MHz and 1645.5-1646.5 MHz portion of the additional spectrum requested by AMSC is allocated to the Mobile Satellite Service and is limited to distress and safety operations.[58] Because AMSC is already authorized to provide AMSS(R) on upper L-band frequencies, we will modify AMSC's satellite authorizations to include these 2 MHz of spectrum for distress and safety operations, consistent with the allocation requirements. AMSC's request regarding the remaining bands raises several issues, however. The 1530-1544 MHz and 1626.5-1645.5 MHz bands are allocated to the Maritime Mobile Satellite Service (MMSS). In General Docket No. 90-56, the Commission proposed that the MMSS bands be reallocated on a shared basis for generic MSS.[59] In the *MMSS Allocation Notice*, we stated that we did not intend to accept applications for a regularly authorized MSS satellite system to use these bands until the

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Geostar's argument was fully addressed in the AMSC Authorization Order, where the Commission stated that it is not under an obligation to "call for" competing applications, only to consider all applications that are filed, and that it is appropriate for the Commission to consider a request for a partial waiver of its allocation requirements on an individual basis. *See* AMSC Authorization Order, 4 FCC Rcd at 6041, para. 69.

[54] *See* discussion at paras. 36-47, *infra*. Geostar does not dispute AMSC's need for 100 MHz of assigned bandwidth at dual polarization to support its currently authorized operations at 1545-1599 MHz and 1646.5-1660.5 MHz.

[55] AMSC's January 1992 transponder plan identifies 75 MHz for upper L-band operations, 5 MHz for Ku-to-Ku band gateway interconnect operations, and 75 MHz for lower L-band operations. The remaining 45 MHz are identified for guard band and telemetry, tracking, and control functions. Hence, AMSC apparently requires only 125 MHz of spectrum to support its upper L-band operations. Its request to use 200 MHz of spectrum is therefore due, primarily, to its proposal to add lower L-band capability to AMSC-1.

[56] These frequency bands, which were contained in the January 1992 amendment, are slightly modified from those bands contained in the December 1989 application. AMSC's October 1992 amendment requesting authority to use portions of the 12/14 GHz bands for on-station TT&C operations will be addressed in a later order. *See* note 24, *supra*.

[57] *See* American Mobile Satellite Corporation, Application to modify space station authorizations to operate at 1530-1545 MHz and 1626.5-1645.5 MHz (filed January 25, 1990).

[58] *See* 47 C.F.R. § 2.106, Footnotes 727A and 734B.

[59] *See* Notice of Proposed Rulemaking, General Docket No. 90-56, 5 FCC Rcd 1255 (1990) (MMSS Allocation Notice). The Commission has proposed that MMSS and MSS be co-primary in these lower L-band frequencies and that MMSS distress and safety communications have priority access with real-time preemptive capability in these bands. This proposal differs somewhat from the international allocation for these bands which recognizes LMSS use of a portion of the MMSS bands on a co-primary or secondary basis and which restricts LMSS to non-speech, low bit-rate data communications. The other portion has been allocated to MSS in Region 2.

allocation proceeding is concluded.[60] Thus, AMSC's application for operational authority has not been accepted for filing nor placed on public notice.[61]

38. AMSC offers two justifications in support of this construction authority request. First, it states that international coordination may result in insufficient upper L-band spectrum being available for AMSC's use and that the MMSS bands would be an additional source of spectrum to support efficient and economical operation of the system. AMSC argues that, because the coordination process will occur during the same time period as spacecraft construction, it would be prudent to authorize the construction of the additional L-band frequencies at this time. Second, AMSC asserts that addition of the lower L-band frequencies would make AMSC's system compatible with Canada's MSS system, which is to operate at 1530-1559 MHz and 1626.5-1660.5 MHz. AMSC states that it will cost approximately $2.35 million to add the equipment necessary to operate in the MMSS bands.[62] It further asserts that if it is not permitted to incorporate the MMSS band capacity as AMSC-1 is being built and must later add the equipment outside the ordinary course of construction, the cost of adding the capacity will increase more than five-fold.[63]

39. Several parties oppose AMSC's construction request. Motorola, in its petition to deny, argues that acceptance of AMSC's construction request would violate the "freeze" for lower L-band applications. COMSAT states that AMSC's proposed use of the MMSS bands is contrary to the international allocation and could seriously interfere with other systems, such as INMARSAT's, whose use of these bands conforms with the international allocation. ARINC-ATA agree with these concerns and question how the addition of the MMSS bands to AMSC's system will ease any difficulty in coordinating use of the upper L-bands for AMSS(R) traffic since that service has no priority and preemptive capability in the lower L-bands. ARINC-ATA also fear that the additional cost to increase the system's capability will be borne by ratepayers, even if AMSC is not authorized to operate on the additional spectrum, and that the increased switching complexity of the system will adversely affect the system's reliability and internal electromagnetic interference potential.

40. Geostar also raises a number of legal and policy concerns. Geostar notes that the Commission has not yet addressed licensing issues for the MMSS bands. It asserts a separate system in the lower L-bands would foster competition and also could be used to back-up Canada's MSS system. Geostar also suggests that AMSC's request is premised on the assumption that concessions on spectrum use will be made in international coordination of the upper L-band system, which may not be the case.[64] Finally, Geostar believes that, even if AMSC were allowed to proceed with construction at its own risk, the outcome of future Commission proceedings regarding these bands would be prejudiced because AMSC's financial investment would be significant. Geostar notes that the Commission has consistently treated construction on new frequency bands in the domestic fixed-satellite service as a trigger for a processing group, with all applications in that group afforded concurrent consideration. If AMSC were granted construction authority for the MMSS bands under Section 309 of the Act, Geostar argues that the AMSC application for operating authority – *i.e.*, a cover license – could be considered under Section 319(c) of the Act using a less stringent legal standard than the standard used for other applications on file.[65]

41. Although we have proposed to reallocate the MMSS bands to be shared with generic MSS, a decision to change the allocation for those bands has not yet been made.[66] Further, we stated in the *Notice* that we did not intend to accept applications for an MSS system to use the MMSS bands until the allocation proposals for the bands are finalized.[67] Nevertheless, AMSC argues that the MMSS bands, if they are reallocated for MSS use, should be assigned to MSS systems already licensed. Others argue that the MMSS bands should be made available for new systems. We will not, however, make this determination in the context of acting upon an application to modify AMSC's *upper* L-band system. We agree that AMSC's request for construction authority in the MMSS bands, which is presented as a request to modify its underlying satellite authorizations, is tantamount to a new application for construction authority under Section 309. Thus, grant of AMSC's construction request in this context would determine one of the central issues of the MMSS band proceeding before the full record in that proceeding is completely addressed. If AMSC wishes to pursue a lower L-band system, it will be required to amend its application for operational authority in the MMSS bands to include

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[60] *Id.* at n.23.

[61] Geostar also filed an application to implement a digital land mobile satellite service system in these bands. However, this application was dismissed when Geostar entered bankruptcy proceedings. *See* letter from Chief, Domestic Facilities Division to Richard H. Waysdorf (March 10, 1992). Geostar's trustees in bankruptcy have filed an appeal of the dismissal.

[62] *See* letter from Counsel, AMSC to Chief, Domestic Facilities Division (September 16, 1992).

[63] *Id. See also* letters from Brian B. Pemberton to Chief, Domestic Facilities Division (April 2, 1992 and March 25, 1992). *See also* Letter of W. Garner, Chief Scientist, American Mobile Satellite Corporation to Chief, Domestic Facilities Division, Common Carrier Bureau (July 6, 1990) in response to Letter of Chief, Domestic Facilities Division, Common Carrier Bureau to W. Garner, Chief Scientist, American Mobile Satellite Corporation (June 22, 1990). While Geostar and Comsat questioned AMSC's 1990 cost estimates, no entities have commented on the modified 1992 estimates.

[64] In its reply to AMSC's opposition, Geostar also argues that anticipated difficulties in coordination is not a sufficient basis to justify the assignment of additional spectrum to AMSC's system. Rather, Geostar observes, under existing Commission policy a license is granted subject to additional conditions on the use of assigned frequencies as a result of coordination, *see* 47 C.F.R. § 25.202(c). Thus, satellite licensees are not assured full use of assigned frequencies as a matter of policy. Geostar also is concerned that if AMSC is given the opportunity to assign its traffic to the MMSS bands in order to coordinate its system, the ability of other prospective MSS applicants to use the MMSS bands would be significantly prejudiced.

[65] Geostar notes that, in granting a cover license application under Section 319(c), the public interest finding made under Section 309 to authorize construction of radio facilities continues in effect.

[66] Furthermore, the MMSS Allocation Notice asks for comment on a number of specific issues, such as whether communications should be restricted to digital transmissions (and appropriate bit rates) or to non-speech, data-only transmissions. *See* 5 FCC Rcd at 1255, para. 28 (1990). These issues could affect the final form of an MSS allocation in the MMSS bands.

[67] *Id.* at n.23.

construction and launch authority, as well. The application will be considered when the Commission determines licensing policies for the MMSS bands.

42. Nevertheless, we find that the public interest would be served by considering AMSC's construction request as a request for a waiver of Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), and allowing AMSC to begin construction at its own risk and subject to final action on the underlying application.[68] While we generally do not waive the construction permit requirement when concerns have been raised regarding the underlying application, we believe that the unique circumstances here justify a waiver. AMSC is in the process of constructing AMSC-1, and it will be built regardless of whether we grant the application for the MMSS bands. The cost of incorporating the additional capacity, however, will increase substantially if AMSC is not permitted to implement the modifications as the satellite is being built. If AMSC wishes to take advantage of this savings at the risk that its underlying application may not be granted, we see no reason to prevent it from doing so. First, the $2.35 million potential expense to incorporate the modification on AMSC-1 is not significant when compared to the $38 million total cost of constructing the satellite. Second, according to the record, the additional MMSS capability is merely an expansion of the tuning range of the frequency converter units. By adding this capability, all filter/converter elements will still be able to operate in the upper portion of the L-band without restriction. Consequently, there would be no idle upper L-band capacity on the satellites if AMSC is not authorized to use the lower L-band tuning capability. Third, AMSC's MSS system is intended to be used to back-up the Canadian MSS system, which is to include both the upper and lower L-bands. Indeed, the AMSC system and the Canadian system are being jointly procured. Allowing AMSC to incorporate the MMSS capability will permit it to perform this back-up function if necessary, and to preserve the economies of scale that exist in the joint procurement.

43. This waiver includes the incorporation of both the MMSS band capacity and the corresponding Ku-band feeder links. In this regard, we will allow AMSC to construct AMSC-1 with the capability of operating its feeder links over 200 MHz of bandwidth in each transmission direction. As noted, we believe that AMSC's request for expanded feeder link spectrum is primarily due to the incorporation of the MMSS band frequencies.[69] However, this change will not affect the operation or capability of AMSC's upper L-band system. AMSC-1's proposed design, as modified, includes hybrid matrix amplifiers that route the output power to the exact L-band carrier frequency that corresponds to the exact Ku-band input frequency. Thus, AMSC appears to have developed a more efficient L-band spectrum design that will allow it to serve both the upper and MMSS bands using essentially the same amount of spectrum that was initially authorized, 200 MHz consisting of 100 MHz with dual polarization. Thus, if AMSC is not granted authority to operate in the MMSS bands, the Ku-band feeder link bands corresponding to these frequencies will be available for another operator while AMSC's provision of service in the upper L-band will not be affected. Consequently, we grant AMSC a waiver of Section 319(d) of the Commission's rules to construct feeder links in the 10.75-10.95 GHz band for downlink transmission with vertical linear polarization and in the 13.0-13.15 GHz and 13.20-13.25 GHz bands for uplink transmission with horizontal linear polarization.

44. We recognize the concerns regarding possible prejudice to future Commission proceedings, and emphasize that this waiver should in no way be construed as evidence of Commission inclination on any of these matters. The sums that may be expended pursuant to this waiver are not significant when compared to the total system costs, and we would not hesitate denying AMSC's application to provide domestic service in the MMSS bands on the basis that the reallocation should not be made or that the public interest would be better served by licensing another system.[70]

45. Thus, there are several persuasive reasons to grant AMSC a waiver. In contrast, preventing AMSC from beginning construction of the additional capability will substantially increase system costs should its application be granted, to the detriment of its customers, or should it be used to back-up the Canadian system. Further, directing AMSC to delay construction altogether until the licensing issues regarding the MMSS bands are addressed, as Geostar suggests, is inadvisable. AMSC's system is authorized to operate in the upper L-band frequencies, and there is a need to bring those frequencies into use without undue delay so that the aeronautical and other mobile services designated for those bands can be made available to the public.

46. Accordingly, we grant AMSC a waiver pursuant to Section 319(d) of the Commission's rules, 47 C.F.R. § 319(d), to expend up to $2.35 million to incorporate the proposed MMSS and Ku-band capability onto AMSC-1. This waiver is without prejudice to final action on AMSC's underlying application for the MMSS bands or on any related issue regarding this satellite. If the application is denied, expenditures made pursuant to this waiver will not be included in any rate base or charged to expense for rate purposes but will be charged to surplus.

H. Network Control Architecture, Earth Station Design, and Link Budgets

47. In addition to the specific modifications to the spacecraft already discussed, AMSC has provided additional information on other system components, including network control architecture, mobile and fixed earth station design, and link budgets. We requested this information because once the inter-relationships between these system components were clarified, AMSC could proceed with

[68] AMSC is authorized, pursuant to a Section 319(d) waiver, to continue to construct AMSC-1 and to incorporate all proposed modifications, including the lower L-band modifications, for a one-year period ending on April 1, 1993. *See* note 15, *supra*. The waiver we are considering here would permit AMSC to continue with construction until its underlying application for the MMSS bands is acted upon.

[69] *See* note 55, *supra*.

[70] Because we are not issuing AMSC a construction permit, AMSC's application for regular construction authority and for operational authority will be considered under the standards enunciated in Section 309 of the Communications Act.

spacecraft construction even though further design details regarding these system components would have to be developed.[71]

48. AMSC is developing a network control architecture comprised of two types of facilities: a network operations center (NOC) and network control centers (NCCs). The NOC would handle over-all system management and would track and assign spectrum and power resources within the system, such as assigning channel pools to the NCCs. The NCCs, in turn, would manage the real-time assignment of demand circuit switched channels to users of the system. The NCCs would control all mobile terminal access to the system and, as needed, would be able to preempt (force-clear) any assigned channel in its pool. AMSC would have two NCCs (redundant facilities) under its direct control to provide demand circuit switched channel access to users. AMSC also would allow users to access the satellites through self-contained subsystems that it would indirectly control. These subsystems would function under their own NCCs and may be assigned bulk bandwidth and power by the NOC. Further, all NCCs interconnecting with the network would have the same capability to control access to the satellites, preempt channels, and regulate malfunctions of mobile terminals. AMSC indicates that specific frequencies and appropriate power will be assigned initially for AMSS(R) use and managed by the AMSS(R) provider. Bandwidth and power adjustments, both short-term and long-term, will be managed by the NOC. AMSC indicates that it will develop a "forecasting" capability so that these periods of increased AMSS(R) demand can be projected with sufficient notice and adjustments can be made within the overall system without relying on real-time preemption on a regular basis. Real-time preemptive capability would be employed when needed, however.

49. AMSC is planning for several different types of mobile terminals for use with its satellite system.[72] It states that all mobile terminals will be required to meet minimum performance and operational requirements (*e.g.*, spurious emissions, e.i.r.p. density, modulation) in order to connect with the system and that type approval will be required to ensure protection of AMSS(R) communications. AMSC expects that three classes of earth station antennas (omnidirectional, mobile directive, and stationary directive) and two types of communication channels (circuit switched and packet switched) will be used by the majority of mobile terminals using the MSS system. Basic characteristics for mobile terminals with these representative antenna and channel types are provided. AMSC also provides link budgets for each of these representative mobile terminals and link budgets for three representative AMSS(R) links based on INMARSAT's Aeronautical Systems Definition Manual (ASDM).[73] AMSC has assumed a carrier-to-interference (C/I) power ratio of 25 dB for all links and indicates that reduced C/I ratios may be accepted during the international coordination process. Finally, AMSC provides basic characteristics for typical fixed earth stations within its system.

50. ARINC-ATA complain that the network control architecture described by AMSC does not demonstrate priority and preemptive access for AMSS(R) and interoperability with other satellite systems. They seek further clarification of how an AMSS(R) subsystem would be designed and how it would interface with the basic system -- *e.g.*, blocking and delay estimates, error correction, preemption of circuit switched demand channels. In particular, ARINC-ATA express concerns about the amount of spectrum that will be made available to an AMSS(R) subsystem and about the subsystem's ability to control (*i.e.*, to force clear or preempt) channels within the overall system and within the AMSS(R) subsystem. ARINC-ATA also urge the Commission to require AMSC to accommodate avionics and ground earth stations designed with Characteristic 741 capability[74] and to develop intersystem hand-off procedures, thereby ensuring that an aircraft will be able to communicate with all available satellite systems providing service to or near the U.S. ARINC-ATA also complain that AMSC has not provided the basic characteristics for aircraft earth stations as it has for other mobile terminals and it is not clear whether non-aviation fixed and mobile terminals will not interfere with AMSS(R) communications. Claiming that a C/I ratio of 25 dB for link budgets is too optimistic, ARINC-ATA request specific information on C/I reductions and other system adjustments that AMSC anticipates making during coordination. ARINC-ATA express some concern about potential intersystem interference but observe that the potential cannot be adequately assessed because AMSC has not provided specific characteristics for sidelobe performance for the proposed directive mobile and stationary antennas. COMSAT believes that AMSC's plans to use omnidirectional mobile antennas provide no intersystem isolation for AMSC's satellite at 101^0 W.L., precluding co-channel sharing in geographic areas covered by both AMSC's and INMARSAT's systems.

51. We believe that the most expeditious and efficient means for developing and implementing this domestic MSS-AMSS(R) system is to allow AMSC to define further the ground and mobile terminal requirements for the system while spacecraft construction progresses. The relevant technical standards cited by ARINC-ATA go to ground

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[71] *See* AMSC Authorization Order, 4 FCC Rcd at 6041, para. 91.

[72] On April 23, 1993, AMSC filed an application seeking a blanket license for 200,000 mobile terminals for land and maritime applications using medium and high gain antennas (see note 20, *supra*). In the application, AMSC states that the mobile units will employ sufficient safeguards to comply with the priority and preemptive access requirements stipulated in Footnote US308. AMSC further states that the mobile terminals will meet the criteria advanced by NTIA and FAA (see note 33, *supra*). AMSC has also filed an application to construct and operate an 11 meter fixed hub earth station for communications with AMSC's satellite at 101^0 W.L. AMSC states that the system design complies with Footnote US308.

[73] AMSC acknowledges that the INMARSAT ASDM describes two classes of aircraft earth station (omnidirectional and directive antennas), four types of communication channels, and seven transmission bit rates. These characteristics would allow for more combinations than the three representative AMSS(R) links described in AMSC's applications.

[74] Characteristic 741 describes the performance criteria for avionics and ground facilities providing AMSS(R) communications. Characteristic 741 is incorporated in the International Civil Aviation Organization's (ICAO's) Standards and Recommended Practices (SARPs) and RTCA, Inc. Special Committee 165's (SC-165's) Minimum Operational Performance Standards (MOPs).

facilities. As AMSC notes, the space stations are "bent pipes" that can accept any ground system design. Consequently, we can permit spacecraft construction to proceed while monitoring implementation of the ground segment. In addition, we will continue to oversee the planning and implementation process for the overall system. In this regard, we have completed a rulemaking proceeding to establish type acceptance and licensing procedures for aircraft earth stations and adopted service rules for type acceptance and licensing procedures for aircraft earth stations,[75] and Commission staff are actively involved in various domestic and international efforts relating to aeronautical mobile satellite technical standards and system design.[76] We recognize, however, that the overall satellite system design must be sufficient to provide AMSS(R) communications consistent with established aviation industry standards.[77] Further, AMSC's satellite system must be capable of providing AMSS(R) with priority and preemptive access consistent with the domestic allocation and AMSC's authorization. In order to ensure these results, we believe it will be most beneficial to address the numerous issues raised here regarding network control architecture, and mobile and fixed hub earth station characteristics when AMSC files applications to construct and operate the ground and mobile facilities necessary to bring its system into operation. Consequently, we will address these and other issues during the mobile and fixed hub earth station licensing process and the NTIA/FAA proposed rulemaking proceeding.

IV. CONCLUSION

52. For the reasons discussed above, we find that pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, the public interest, convenience and necessity will be served by granting AMSC authority to modify its AMSC-1 satellite authorization, consistent with the terms and conditions set forth in this order in the following areas: L-band and Ku-band satellite antenna coverage patterns; transponder configuration; temporary use of 12/14 GHz frequencies for TT&C during the launch phase and orbit transition phase; assignment of additional 11/13 GHz frequencies for feeder link operations; and addition of the 1544-1545 MHz and 1645.5 MHz frequencies for distress and safety operations. AMSC's request to modify its satellite authorization to permit the construction of operational capability on additional L-band frequencies is denied. However, we find that pursuant to Section 319(d) of the Act, 47 U.S.C. § 319(d), the public interest, convenience and necessity will be served by waiving the construction permit requirement so that AMSC, at its own risk and consistent with the terms and conditions set forth in this order, may construct AMSC-1 with operational capability in the 1530-1544 MHz and 1626.5-1645.5 MHz and the associated Ku-bands. Finally, AMSC must amend its pending application to operate in the 1530-1544 MHz and 1626.5-1645.5 MHz and the associated Ku-bands to request construction and launch authority for those bands if it wishes to pursue a regular authorization for those bands.

V. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED that Application File Nos. 7-DSS-MP/ML-90 and 20-DSS-MP/ML-92 ARE GRANTED IN PART AND DENIED IN PART to the extent set forth in this order and that AMSC Subsidiary Corporation IS AUTHORIZED to modify the technical parameters of its AMSC-1 mobile satellite as proposed in its applications and as modified by this order.

54. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 319(d), AMSC Subsidiary Corporation, at its own risk and consistent with the terms and conditions set forth in this order, may expend up to $2.35 million to construct AMSC-1 with operational capability in the 1530-1544 MHz and 1626.5-1645.5 MHz bands and associated Ku-bands. This construction waiver is granted without prejudice to final action on the pending application, as amended, regarding these frequency bands or on any related issue regarding this satellite. If the pending application is denied, expenditures made pursuant to this waiver will not be included in any rate base or charged to expense for rate purposes but will be charged to surplus.

55. IT IS FURTHER ORDERED that Application File Nos. 21-DSS-EXT-92 and 33-DSS-EXT-92 ARE GRANTED and that the milestone dates specified in paragraph 135 of the *AMSC Authorization Order*, 4 FCC Rcd 6041 (1989), are modified as follows:

	Construction Commenced	Construction Completed	Launched No Later Than
AMSC-1	. . .	April 1994	December 1994

56. IT IS FURTHER ORDERED that action on Application File Nos. 8/9-DSS-MP/ML-90, relating to the AMSC-2 and AMSC-3 satellites, IS DEFERRED.

57. IT IS FURTHER ORDERED that the petitions to deny filed by Geostar Messaging Corporation and Motorola Satellite Communications, Inc. ARE DENIED IN PART and GRANTED IN PART, to the extent set forth herein.

58. AMSC Subsidiary Corporation is afforded thirty days from the date of release of this order to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of this authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[75] *See* note 37, *supra*.

[76] *See* note 33, *supra*.

[77] AMSC notes that technical standards for AMSS(R) are still being developed by RTCA, Inc. SC-165 and other aviation industry groups. RTCA is a public committee sponsored by the Federal Aviation Administration (FAA) that is developing standards for domestic AMSS(R) systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo County Community College District against Coast Cable-Western Communications, Inc.	CSR-3768 CA1468

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Coast Cable-Western Communications Inc. ("Coast"), had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses the system's principal headend at San Jose, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission,* Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Coast Cable-Western Communications Inc. IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order.* This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo County	CSR-3772
Community College District	CA0459
against Multivision Cable TV	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Multivision Cable TV ("Multivision"), operator of a cable television system serving Fairfield, California had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses Multivision's principal headend at Fairfield, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Multivision Cable TV IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of the University of Illinois Board of Trustees against TCI of Illinois-Onarga — CSR-3792

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On February 26, 1993, a complaint was filed with the Commission on behalf of the University of Illinois Board of Trustees, licensee of Station WILL-TV, (Educ., Channel 12), Urbana, Illinois. According to WILL-TV the station is entitled to on-channel carriage by cable television systems serving the following Illinois communities, all of which are owned by TCI of Illinois-Onarga, because WILL-TV's Grade B contour encompasses the principal headend of the cable system serving each of them, and therefore WILL-TV is a "local" signal for each of these areas within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992): Onarga, Danforth, and Gilman.

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and which terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed February 26, 1993, by the University of Illinois Board of Trustees IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI of Illinois-Onarga IS ORDERED to commence on-channel carriage of Station WILL-TV, Channel 12, Urbana, Illinois, on its cable television systems in Onarga, Danforth, and Gilman, Illinois, forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Virginia Educational Telecommunications Corporation against MetroVision of Prince George's County, Inc. — CSR-3756

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On December 4, 1992, the mandatory carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), became effective for certain noncommercial education stations. On January 28, 1993, the Central Virginia Educational Telecommunications Corporation, licensee of Television Broadcast Station WNVT (Educ., Channel 53), Goldvein, Virginia, filed a complaint against MetroVision of Prince George's County, Inc. ("MetroVision"), operator of a cable television system serving portions of Prince George's County, Maryland. According to WNVT, the station's Grade B contour encompasses MetroVision's principal headend at Landover, Maryland, and WNVT, therefore, is entitled to carriage as a "local" signal within the meaning of §5(1)(2) of the 1992 Cable Act.

2. On March 15, 1993, MetroVision filed an *Opposition* to WNVT's complaint which it supplemented on April 13, 1993, noting that it carried WNVT until January 1992, when it terminated WNVT's carriage because of a significant number of subscriber complaints due to poor signal quality. Citing §4(h)(1)(B)(iii) of the 1992 Cable Act, MetroVision notes that a commercial UHF broadcast station cannot mandate carriage by a local cable system unless it delivers a signal level of -45 dBm at the input terminals of the system's principal headend. According to measurements performed on February 25, 1993, at MetroVision's headend in Capitol Heights, Maryland, using generally accepted engineering practices and equipment, WNVTs' signal varied between -61.75 dBm and -61.35 dBm.[1] According to MetroVision, there is a large hill between its headend and WNVT's transmit site, and the cable system had invited WNVT's technical personnel to take signal strength measurements at its headend in 1991, which they did, so the station has been aware of this situation for quite some time. Moreover, Roger Wells, MetroVision's Vice President and Regional Manager, once again discussed the problem with an employee of WNVT following the station's present request for carriage and suggested their engineer contact MetroVision's to resolve it, but no subsequent discussions were ever initiated to MetroVision's knowledge. Finally, MetroVision notes the *Standstill Order* and the pending litigation addressing the constitutionality of the 1992 Cable Act in *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992), and argues that §5 of the 1992 Cable Act violates the system's rights guaranteed by the First Amendment and by the Fifth Amendment to the United States Constitution.

3. A decision upholding the constitutionality of the 1992 Cable Act and terminating the *Standstill Order* was issued April 8, 1993, by the United States District Court of the District of Columbia in *Turner Broadcasting System, Inc., supra*. However, staff review of the engineering data submitted by MetroVision demonstrates that WNVT fails to provide a good quality signal at MetroVision's headend, as mandated by §615(g)(4) of the 1992 Cable Act. Therefore, WNVT is not entitled to mandatory carriage on the cable television system operated by MetroVision of Prince George's County, Inc., and the petition filed January 28, 1993, by the Central Virginia Educational Telecommunications Corporation IS DISMISSED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] In this particular case, MetroVision utilized 120 feet of Comm/Scope .500 copper-clad, center-conductor cable, a ten-year old antenna (Model #QCA-UHF) located at the eighty foot level of a tower at the headend, and a Tektronix 2714 system analyzer, last calibrated in December 1992. The measurements were made in overcast weather with temperatures in the thirties at two hour intervals between 8:00 am and Midnight.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Virginia Educational Telecommunications Corporation against Multivision Cable TV — CSR-3755

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On December 4, 1992, the mandatory carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), became effective for certain noncommercial education stations. On January 28, 1993, the Central Virginia Educational Telecommunications Corporation, licensee of Television Broadcast Station WNVT (Educ., Channel 53), Goldvein, Virginia, filed a complaint against Multivision Cable TV ("Multivision"), operator of a cable television system serving Prince George's County, Maryland. According to WNVT, the station's Grade B contour encompasses Multivision's principal headend at Lanham, Maryland, and WNVT, therefore, is entitled to carriage as a "local" signal within the meaning of §5(1)(2) of the 1992 Cable Act.

2. By letter dated December 8, 1992, Multivision declined to carry WNVT on its system, pending resolution of the *Standstill Order* and of the litigation addressing the constitutionality of the Cable Act in *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992), but stated that it would do so, if it was required to, after the above issues were resolved.

3. The *Standstill Order* deferred any Commission action regarding educational television stations' complaints of noncarriage for 120 days, or until an appealable order of the court was entered. However, it did not preclude the filing of complaints regarding carriage disputes or delay the schedule for the filing of responsive pleadings. On April 8, 1993, the Court issued its opinion in this case upholding the provisions of the 1992 Cable Act and terminating the *Standstill Order*.

4. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 28, 1993, by the Central Virginia Educational Telecommunications Corporation IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Multivision Cable TV IS ORDERED to commence carriage of Station WNVT, Channel 53, Goldvien, Virginia, on its cable system serving Prince George's County, Maryland, forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo County	CSR-3778
Community College District	CA0446
against Wander Cable	
Television-Anchor Bay	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1993; Released: June 14, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KSCM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Wander Cable Television-Anchor Bay ("Wander"), had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses Wander's principal headend at Gualala, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Wander Cable Television-Anchor Bay IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-98

In re Applications of

Mary Anne Embrey d/b/a CLARKSVILLE RADIO	File No. BPH-890830MF
LISA M. JENKINS	File No. BPH-890905MA
Q PRIME, INC.	File No. BPH-890905ME
KENTUCKIANA RADIO PARTNERS	File No. BPH-890905MO
CLARKSVILLE BROADCASTING LTD. PARTNERSHIP	File No. BPH-890905MU

For Construction Permit for a
New FM Station on Channel 226A
in Clarksville, Indiana

ERRATUM

Released: June 15, 1993

The Review Board *Order*, FCC 93R-24, adopted May 19, 1993 and released May 28, 1993, IS CORRECTED to show the MM Docket No. 91-98 in lieu of MM Docket No. 91-88.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-81

In the Matter of

Alaska Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 14, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 28, 1993, Region 2 (Alaska) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Alaska.

2. The Alaska Plan was placed on Public Notice for comments due on April 30, 1993, 58 FR 16672 (March 30, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Alaska and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Alaska.

4. Therefore, we accept the Alaska Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Alaska may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-82

In the Matter of

Puerto Rico Public Safety Plan

ORDER

Adopted: June 2, 1993; Released: June 14, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 29, 1993, Region 47 (Puerto Rico) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Puerto Rico.

2. The Puerto Rico Plan was placed on Public Notice for comments due on April 30, 1993, 58 FR 16672 (March 30, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Puerto Rico and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Puerto Rico.

4. Therefore, we accept the Puerto Rico Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Puerto Rico may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASSOCIATED COMMUNICATIONS OF LOS ANGELES, INC.

File No. I-T-C-93-083

Application for Authority Under Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and the PAS-1, TDRS, and Morelos satellites, and between the United States and U.S. domestic satellites, for the provision of international data, voice and video services between the United States and various international points

ORDER AND AUTHORIZATION

Adopted: May 25, 1993; Released: June 15, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, by Associated Communications of Los Angeles, Inc.[1] (ACLA), we find that the public convenience and necessity would be served by ACLA's provision of international data, voice and television services between the United States and the points listed in Appendix 1 for the specific satellite systems requested.[2]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-083 IS GRANTED, and ACLA is authorized to:

a. establish up to ten (10) voice grade circuits between appropriately licensed earth stations in the United States and the PAS-1 and TDRS satellites for the provision of private line service, not interconnected with the public switched network, between the United States and points listed in Appendix 1 for each of those satellites.

b. establish channels of communication between appropriately licensed earth stations in the United States and the PAS-1 and TDRS satellites for the provision of video transmissions,[3] not interconnected with the public switched network, occupying up to three (3) 40 MHz transponders on the PAS-1 and TDRS satellites between the United States and the points listed in Appendix 1 for each of those satellites;

c. establish channels of communication between appropriately licensed earth stations in the United States and certain U.S. domestic satellites for the provision of transborder services, not interconnected with the public switched network, between the United States and the countries listed in Appendix 1, consistent with consultations under Article XIV(d) of the INTELSAT Agreement; and

d. establish channels of communication between appropriately licensed earth stations in the United States and the Morelos satellite system for the provision of transborder services, not interconnected with the public switched network, between the United States and Mexico, consistent with consultations under Article XIV(d) of the INTELSAT Agreement.

3. IT IS FURTHER ORDERED that our authorization of ACLA to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix 1 -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix 1, or which originate in one of the points listed in Appendix 1 and terminate in the United States. In addition, ACLA may not -- and ACLA's tariff must state that ACLA's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither ACLA nor any persons or companies directly or indirectly controlling or controlled by ACLA, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of

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[1] We placed the application on public notice January 27, 1993. No comments were filed.

[2] Although ACLA seeks authorization to serve countries which the Commission may authorize in the future to be served by the TDRS satellites, we note that under *International Competitive Carrier* an applicant must specify the countries to which it proposes to provide service. *See International Competitive Carrier*, 102 FCC 2d 812, 845 (1985). In this context, we cannot grant ACLA's request after the application came off public notice to add points to its application to provide service over TDRS. *See* Letter, dated April 21, 1993, from Catherine Wang, Counsel for ACLA, to Donna R. Searcy, Secretary, Federal Communications Commission.

[3] ACLA states that these transmissions will include broadband analog and digitally compressed television programming.

any concession, contract, understanding, or working arrangement to which ACLA or any persons or companies controlling or controlled by ACLA are parties.

5. IT IS FURTHER ORDERED that ACLA shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before adding any circuits or channels of communication for the provision of service over the PAS-1 or TDRS satellite systems.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports for circuits acquired on U.S. domestic or Morelos satellite systems pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

11. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

12. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX 1

PAS-1

Albania
Anguilla
Antigua
Argentina
Armenia
Aruba
Austria
Azerbaijan
Bahamas
Barbados
Barbuda
Belarus
Belize
Belgium
Bermuda
Bolivia
Brazil
British Virgin Islands
Bulgaria
Cayman Islands
Chile
Columbia
Costa Rica
Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Estonia
France
Georgia
Germany
Greece
Grenada
Guatemala
Guyana
Haiti
Honduras
Hungary
Ireland
Italy
Jamaica
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Mexico

Moldova
Monaco
Montserrat
Netherlands
Netherlands Antilles
Panama
Paraguay
Peru
Poland
Portugal
Romania
Russian Federation
Spain
St. Christopher and Nevis
St. Lucia
St. Vincent and Grenadines
Suriname
Sweden
Switzerland
Suriname
Tajikistan
Trinidad and Tobago
Turkmenistan
Turks and Caicos Islands
Ukraine
United Kingdom
Uruguay
Uzbekistan
Venezuela
Yugoslavia

TDRS

Austria
Bahamas
Belgium
Canada
France
Germany
Hong Kong
Ireland
Israel
Jamaica
Mexico
Netherlands
Portugal
Sweden
Switzerland
United Kingdom

U.S. Domestic Satellites

Anguilla
Antigua and Barbuda
Bahamas
Barbados
Belize
Bermuda
British Virgin Islands
Canada
Cayman Islands
Dominica
Grenada
Grenadines
Montserrat
Netherlands Antilles
St. Christopher-Nevis
St. Lucia
St. Vincent
Turks and Caicos Islands
Venezuela

Morelos Satellite

Mexico

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System Between Denmark and Russia

File No. I-T-C-93-089

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ORDER AND AUTHORIZATION

Adopted: May 27, 1993; Released: June 15, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-93-089 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 42 jointly-assigned Minimum Investment Units (MIUs)[2] of capacity in the Denmark-Russia 1 cable system;[3]

b. lease appropriate extension facilities; and

c. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the Denmark-Russia 1 cable system.

2. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2).

[1] AT&T's wholly-owned subsidiary, Transpacific Communications, Inc., will own portions of the Denmark-Russia 1 cable system on behalf of AT&T.

[2] A MIU is defined as a 2.048 Mbit/s digital bit stream ("nominal 2 Mbit/s") and consists of two half-interests which are intended for use between two correspondents respectively for joint working. AT&T's initial share of the capital cost for 42 jointly-assigned MIUs is approximately $3 million, plus $151,000 in interest during construction.

[3] The Denmark-Russia 1 cable system, co-owned by twenty-six parties including AT&T and three other U.S. carriers, extends between Albertslund, Denmark and Kingisepp, Russian Federation. As a party to the Construction and Maintenance Agreement, AT&T's current percentage ownership interest in the Denmark-Russia 1 Cable System is 4.1015%. The estimated half-MIU cost is $72,300 plus interest during construction and the cable system is fully subscribed to its Design Capacity of 512 MIUs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GREATER BOSTON RADIO, INC. File No. BLH-860218KB

Licensee of Station WMJX(FM)
Boston, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1993; Released: June 15, 1993

By the Commission:

1. The Commission has before it for consideration: (a) an "Application for Review" filed November 16, 1987, by Fairbanks Communications, Inc. ("Fairbanks"); and (b) an "Opposition to Application for Review" filed December 11, 1987, by Greater Boston Radio, Inc. ("Greater Boston"). By letter dated October 14, 1987, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), acting by delegated authority, denied Fairbanks' February 20, 1986, "Request for Revocation of Program Test Authority" and its March 19, 1987, "Petition for Relief." The letter also affirmed the grant of Greater Boston's license to cover construction of modified facilities for Station WJMX(FM), Boston. Fairbanks seeks Commission review of the Bureau's action. We deny the application for review for the reasons set forth below.

BACKGROUND

2. On February 7, 1986, Greater Boston notified the Commission of its plan to commence program tests for Station WMJX(FM) from its new location atop the Prudential Tower building in downtown Boston. On February 18, 1986, Greater Boston filed a license application to cover construction of its modified facilities (File No. BLH-860218KB). On February 20, 1986, Fairbanks filed a "Request for Revocation of Program Test Authority." Fairbanks alleged that Station WMJX(FM) was causing interference to reception of the signal of its station, WVBF(FM), in the immediate environs of the Prudential Tower. In response, Greater Boston stated that on February 19, 1986, it had installed filters which suppressed intermodulation products to more than 80 dB below WMJX(FM)'s carrier in compliance with Section 73.317(d) of the Commission's Rules. Such action is designed to eliminate spurious emissions from the WMJX(FM) transmitter, assuming that there had been any such emissions. On March 14, 1986, the Mass Media Bureau, by delegated authority, granted Greater Boston's license application. On March 19, 1987, more than one year after the grant of Greater Boston's license application, Fairbanks filed a "Petition for Relief." Fairbanks reiterated that Station WMJX(FM) was causing interference to reception of Station WVBF(FM), and it claimed that the interference was due to blanketing.[1]

3. In its letter dated October 14, 1987, the Bureau dealt with Fairbanks' claims. Initially, the Bureau determined that, because Fairbanks' allegations of interference, which were originally filed prior to the grant of the license application, had not yet been formally addressed, they would be treated as a timely filed petition for reconsideration of the grant of the Greater Boston license application. Although Fairbanks called the interference about which it complained "blanketing interference," it was in fact alleging a form of interference known as Receiver Induced Third Order Intermodulation Effect ("RITOIE"), which is different from blanketing interference.[2] Citing Section 73.209(a) of the Commission's Rules (Protection from interference) and *Blanketing*, the Bureau ruled that Fairbanks was not protected from the alleged RITOIE interference under the provisions of our blanketing rule. The Bureau found that Station WMJX(FM) was operating in accordance with the Commission's technical rules and that Fairbanks had not furnished listener complaints nor otherwise shown that any interference had occurred. The Bureau also noted that the Commission had not directly received listener complaints of interference. Accordingly, the Bureau denied Fairbanks' objections and affirmed the grant of Greater Boston's license application.

4. In its application for review, Fairbanks contends that the Bureau misinterpreted Section 73.318 of the Commission's Rules (FM blanketing interference). Fairbanks submits that it properly alleged that the signal of Station WMJX(FM) was causing blanketing interference to reception of Station WVBF(FM). Thus, according to Fairbanks, because the blanketing rule requires that licensees must satisfy all complaints of blanketing interference received within one year of the commencement of program tests, the Bureau should have ordered Greater Boston to move its transmitter absent resolution of Fairbanks' complaint. Alternatively, Fairbanks contends that a hearing should be commenced to determine the existence or extent of blanketing interference. Fairbanks concedes, however, that listeners had not complained about an inability to receive WVBF(FM).[3]

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[1] "Blanketing interference occurs when 'an FM station's signal strength is of such magnitude that it causes receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations.'" *FM Broadcast Station Blanketing Interference*, 57 RR 2d 126 (1984) (*"Blanketing"*). *See also, Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 n.3 (1992). Section 73.318 of the Commission's Rules provides, *inter alia*, that permittees or licensees must satisfy all complaints of blanketing interference received by the station during a one year period. The above definition of blanketing and the rule's references to licensee obligations and to receiving equipment not subject to protection are meant to make clear that the rule is designed to protect *listeners* of FM radio and viewers of television, *not* other licensees or permittees.

[2] "RITOIE occurs when strong signals from two stations interact within a receiver to generate a signal on a third frequency. This receiver-generated signal will disrupt reception of any station operating on this third frequency." *WKLX, Inc.*, 6 FCC Rcd 225, 228 n.2 (1991).

[3] Fairbanks also argues that the Bureau erred by: 1) basing its denial of Fairbanks' complaints on Greater Boston's compliance with the technical standards required by Section 73.317 of the

DISCUSSION

5. Initially, we agree with the Bureau that the interference alleged by Fairbanks was RITOIE, not blanketing.[4] Indeed, in documents submitted by Fairbanks in conjunction with its March 19, 1987, "Petition for Relief," Fairbanks acknowledged that the alleged interference complained of was RITOIE. Thus, the Bureau properly determined that the blanketing rule did not afford Fairbanks any protection. In any event, because there were no listener complaints, there is no basis for overturning the grant of Greater Boston's license even if RITOIE-based service disruptions to WVBF(FM) had occurred. *See WKLX, Inc.*, 6 FCC Rcd at 226. In short, whatever theoretical concern Fairbanks had about interference to listeners to WVBF(FM) due to WMJX(FM)'s relocation, there is no indication that any listener actually complained about a reduced ability or an inability to receive *any* FM or television station following the WMJX(FM) move. Accordingly, there were no complaints within the meaning of the blanketing rule for Greater Boston to satisfy.

CONCLUSION

6. Accordingly, IT IS ORDERED that the Application for Review filed by Fairbanks on November 16, 1987, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Commission's Rules; and 2) not resolving the apparent conflict between the admonition in Section 73.315 of the Commission's Rules that licensees locate their antennas so as to achieve appropriate city coverage, and Section 73.318's admonition to locate their antennas so as to avoid blanketing interference. In light of our disposition of Fairbanks' application for review, it is unnecessary to reach these arguments.

[4] If interference had been caused by blanketing, other licensees and individuals probably would have complained. Other than Fairbanks, no such complaints occurred.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SACRAMENTO COMMUNITY RADIO, INC. File No. BPED-870317MD

For a Construction Permit for
A New Noncommercial
Educational FM Station
Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1993; Released: June 15, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration, filed on June 23, 1989, by Sacramento Community Radio, Inc. ("SCR").[1] SCR seeks review of an action by the Chief, Audio Services Division, denying SCR's January 28, 1988 Petition for Reconsideration of the return of its application as unacceptable for filing, affirming the return of SCR's application, and designating for comparative hearing five other applications for a construction permit for a new noncommercial educational FM ("NCE-FM") station at Sacramento, Ione, or West Highlands, California. *Yolo County Public Radio*, 4 FCC Rcd 4482 (MM Bur. 1989).

II. BACKGROUND

2. On December 17, 1985, Yolo County Public Radio ("Yolo") filed an application to provide NCE-FM service to West Sacramento, California, on Channel 205. Subsequently, on February 26, 1986, Sacramento City Unified School District ("SCUSD") filed an application to serve Sacramento, California, on Channel 209. The SCUSD application was not in conflict with the previously filed Yolo application. SCUSD's application was placed on an "A" cut-off list in *Public Notice*, Report No. A-119, released September 22, 1986, establishing October 23, 1986, as the cut-off date for the filing of mutually exclusive applications.[2] The *Public Notice* specifically stated that "any application seeking to be considered with any application appearing on the attached list, *or with any other application on file by the close of business on the cut-off date which involves a conflict necessitating a hearing with any application on this list*, must be substantially complete and tendered for filing at the Office of the Commission in Washington, D.C., not later than the close of business on the cut-off date." (Emphasis added). On October 23, 1986, the last day for the filing of conflicting applications, Family Stations, Inc. ("Family") filed an application to serve North Highlands, California on Channel 207 which was mutually exclusive with SCUSD's application and with Yolo's prior-filed application.

3. Thereafter, on February 13, 1987, Yolo's application was inadvertently placed on an "A" cut-off list establishing March 17, 1987 as the last date for filing applications mutually exclusive with Yolo's. In fact, however, Yolo's application was linked to SCUSD's application by way of a "daisy chain" occasioned by the filing of Family's October 23, 1986 application. Yolo's application, having been on file at the Commission since December 17, 1985, was timely filed with respect to the SCUSD application, the "A" applicant, or the lead application which established the pertinent "A" cut-off date. Thus, the Yolo application was also governed by the SCUSD October 23, 1986 "A" cut-off date, and the Yolo application should not have been placed on a separate "A" cut-off list. Accordingly, by an *Erratum* released March 12, 1987, Report No. A-122A, Yolo's application was deleted from the second "A" cut-off list.

4. However, on March 17, 1987, in response to the erroneous listing of the Yolo application on the second "A" cut-off list, SCR tendered the above-captioned application to provide NCE-FM service to Sacramento, California, on Channel 205. SCR's application was mutually exclusive with the Yolo application and the Family application. Because the cut-off-date for the filing of applications mutually exclusive with Yolo's application was October 23, 1986, as established by the lead SCUSD application, SCR's March 17, 1987 application was not timely filed, and it was returned as unacceptable for filing by staff letter dated December 29, 1987.

III. THE PLEADINGS

5. In its first petition for reconsideration, SCR argued that it was impossible to determine that the filing of Family's application would link SCR in a "daisy-chain" to SCUSD's application. Therefore, SCR maintained, the staff unfairly applied the October 23, 1986 cut-off date to its application. Further, SCR argued that the staff erred by failing to place Yolo's application on an "A" cut-off list first, because that application was the first filed application in the group. SCR asserted that had Yolo's application been placed on an "A" cut-off list first, it would have timely filed a competing application. In its second petition, SCR argues that its application should be accepted because

[1] The Petition for Reconsideration ostensibly seeks reconsideration of the staff's denial of SCR's earlier Petition for Reconsideration, filed January 28, 1988. This second Petition for Reconsideration will therefore be treated as an application for Commission review of the staff's action.

[2] Under the cut-off procedure, NCE-FM applications accepted for filing are placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are in conflict with those listed. This procedure is designed to permit the Commission to cease accepting applications from new parties so that a choice can be made between timely filed applicants. After any such competing applications are filed, these applications are placed on a "B" cut-off public notice which provides for a 30-day period for the filing of petitions to deny. *See* 47 C.F.R. § 73.3573(e)

it was materially misled by the staff's series of actions, culminating in the erroneous inclusion of Yolo's application on an "A" cut-off list released February 13, 1987.

IV. DISCUSSION

6. We deny SCR's petition for the reasons which follow. Regarding SCR's contention that the first-filed Yolo application should have been the first cut off, we note that Section 73.3573(e) states that applications in the reserved band will be processed as nearly as possible in the order in which they are filed, such applications being placed in the processing line in numerical sequence, and drawn by the staff for study, the lowest file number first. While applications are generally assigned to the staff for study in the same order as filed, it does not always follow that the first assigned NCE-FM application is the first cut off, nor is it required to be. More difficult and complex applications take longer to process than easier cases. Additionally, processing times differ because of the nature of the cases assigned and the varying priorities given to individual staff engineers. Moreover, unlike the processing of applications for commercial stations where communities and frequencies are preallotted and mutually exclusive cases can be easily identified and grouped for processing, applications in the reserved band are not preallotted as to frequencies and communities. Accordingly, mutually exclusive applications cannot be identified until after engineering study. As a result, noncommercial educational applications are generally processed independently and mutually exclusive applications are grouped only after a cut-off date has passed.

7. The Commission's cut-off rule serves two purposes. First, it advances the interest of administrative finality by permitting the Commission to fix a date certain by which mutually exclusive applications must be filed. Secondly, it aids timely filed broadcast applicants by granting them a protected status that allows them to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing. *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984). The *Kittyhawk* corollary holds that an application will be considered timely only when filed prior to the cut-off date for the lead application of a group of conflicting applications. *Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *appeal dismissed sub nom. Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968).[3] This policy balances the rights of applicants and potential applicants, while taking into account the public interest in the expeditious provision of new service. It allows applications to be processed without interruption and without the necessity of reprocessing when new applications are filed or pending applications are amended. *See Florida Institute of Technology*, 4 FCC Rcd 1549 (1989), *aff'd* 952 F.2d 549 (D.C. Cir. 1992); *Bill R. Wright*, 102 FCC 2d 1142 (1985).

8. The return of SCR's application was mandated by the "*Kittyhawk* doctrine." In *Kittyhawk*, as in the instant case, the mutual exclusivity arose from a linkage occasioned by the tendering of an application not listed on the "A" cut-off list. The fact that SCR is linked to the SCUSD application through its mutual exclusivity with the timely-filed Family application and that SCR did not file its application by the cut-off date for the SCUSD application renders its application untimely. The Court of Appeals for the District of Columbia Circuit has emphasized the importance of a potential applicant diligently and responsibly pursuing an authorization. "[T]he burden ... is, and properly should be, upon an interested person to act affirmatively to protect himself." *Red River Broadcasting Co. v. FCC*, 98 F. 2d 282, 286 (D.C. Cir. 1938), *cert denied*, 305 U.S. 625 (1938); *Spanish International Broadcasting Company v. FCC*, 385 F.2d 615 (D.C. Cir. 1967). Applicants who ignore or fail to understand the cut-off procedures assume the risk that they will be prevented from filing competing applications. *Bill R. Wright, supra*, at 1147.

9. SCR's argument that it was misled by the staff's actions relating to the Yolo application is unavailing. The staff's actions regarding Yolo are immaterial since it is SCR's link to the SCUSD application that rendered it untimely. Whatever action the staff took or might have taken with regard to the Yolo application does not change that fact. IF SCR intended its application to compete with the Yolo application, we note that it could have filed at any time between Yolo's filing date of December 17, 1985 and SCUSD's cut-off date of October 23, 1986. There is no legal requirement for a potential applicant to await the appearance of a mutually exclusive proposal on a cut-off list. SCR admits that it had actual knowledge that the Yolo application had been filed and was pending before the Commission. Thus, while it was clearly aware of the pendency of the Yolo application, SCR chose to await the appearance of the Yolo application on an "A" cut-off list, and purposely deferred the filing of its mutually exclusive application until that time.[4]

10. Concerning the erroneous cut-off list, it is well settled that the cut-off dates therein have no legal effect. As stated by the Court in *Florida Institute:*

> The core of the [appellant's] case, however, is its contention that the FCC staff's mistaken issuance in September 1986 of the new "A" list, rather than the "B" list appropriate under the cut-off rules, gave the [appellant] rights it would not otherwise enjoy. This new "official notice," the [appellant] argues, effectively started the cut-off process over again, and this time the [appellant] applied on time. We do not agree. The new "A" cut-off date could not supplant the earlier one because the September 1986 notice was without legal effect: "[i]t is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.'" *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1082 (1974).

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[3] In the *Kittyhawk* case the Commission addressed the factual situation where an applicant's proposal is not mutually exclusive with the first filed application, but is mutually exclusive with one or more applications filed on or before the "A" cut-off date. In this so-called "daisy chain" circumstance, the proposal must still be filed by the "A" cut-off date in order for the Commission to consider at one time all mutually exclusive applications.

[4] Furthermore, the Commission issued an *Erratum* five days *prior* to the actual SCR filing, providing notification that the Yolo application had been inadvertently placed on the second "A" cut-off list released February 13, 1987.

952 F2d at 553. In the instant case, the deviant action was clearly the placement of Yolo's application on a second "A" cut-off list and the action was, consequently, without legal effect. Contrary to SCR's assertions, that erroneous action rendered the placement of Yolo's application on the second "A" cut-off list of February 13, 1987 null and void, and certainly did not create or establish new filing opportunities.

11. SCR cites only one case for the proposition that the Commission has allowed an applicant who had been misled by staff error to resubmit its application. SCR contends that the Commission has found compelling circumstances warranting waiver of the cut-off rule to have occurred when an applicant files late in reliance upon bad information supplied by the Commission via ambiguous or erroneous language in Commission documents. In support of this contention, SCR cites *Ramon Rodriguez & Associates*, 3 FCC Rcd 407 (1988). However, this case did not involve the issuance of a second, erroneous cut-off list. *Ramon Rodriguez & Associates* involved the disparate treatment and dismissal of an application which had been filed in response to erroneous data contained in an FM allocation order for a commercial channel. SCR has failed to demonstrate the existence of similarly unusual and compelling circumstances and, thus, failed to successfully meet the substantial burden warranting waiver of the cut-off rule.

V. CONCLUSION

12. Accordingly, for the reasons stated above, IT IS ORDERED That SCR's Petition for Reconsideration, when treated as an Application for Review, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OPEN MEDIA CORPORATION — File No. BPED-880527ML

For New FM Construction
Permit on Channel 213, 90.5 MHz
Chicago, Illinois

and

NORTHERN ILLINOIS UNIVERSITY
and
ROCKFORD EDUCATIONAL BROADCASTING FOUNDATION — File No. BPED-880122MU

For New FM Construction
Permit on Channel 213, 90.5 MHz
Rockford, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1993; **Released: June 15, 1993**

By the Commission:

1. The Commission has before it for consideration (a) an application for review filed on June 23, 1989, by Open Media Corporation ("Open Media"); (b) a petition for reconsideration, filed on February 28, 1990, by Open Media; and (c) related pleadings. These pleadings have been consolidated in this *Memorandum Opinion and Order* because they are inter-related. Specifically, Open Media contests the staff actions of May 26, 1989, denying its request for a waiver of Section 73.509(a) (Prohibited overlap) of the Commission's Rules and returning its application, and the staff action of January 23, 1990, issuing a construction permit to the otherwise mutually exclusive application of Northern Illinois University ("NIU")/Rockford Educational Broadcasting Foundation ("REBF") (together "NIU/REBF"). For reasons which follow, we will affirm the staff actions.

BACKGROUND

2. On January 22, 1988, NIU/REBF filed an application for a new noncommercial educational FM ("NCE-FM") station to serve Rockford, Illinois.[1] On May 27, 1988, Open Media filed a mutually exclusive application for a new NCE-FM station to serve Chicago, Illinois.[2] By letter dated May 26, 1989, following an informal objection by NIU, the staff denied Open Media's request for waiver of Section 73.509(a) of the Commission's Rules and returned Open Media's application. On June 23, 1989, Open Media filed its application for review of the return of its application. On January 23, 1990, the staff, by delegated authority, granted the application of NIU/REBF conditioned on the final disposition of Open Media's administrative appeal. The grant of this construction permit appeared on Public Notice (Report No. 20776) of January 29, 1990. Thereafter, on February 28, 1990, Open Media filed its petition for reconsideration of the staff action granting the NIU/REBF application.

DISCUSSION

3. *Application for Review of Dismissal of Open Media Application.* In its application for review, Open Media argues: that the staff failed to consider the basic public interest questions under Section 307(b) of the Communications Act of 1934, as amended; that it has met the standard for waiver to receive interference by demonstrating the unavailability of alternative sites; that the staff ruling is premised on an inappropriate legal standard in that the staff took an absolutist view of the overlap rule; that the requested waiver is consistent with previous actions by the Commission; that the staff ruling is premised on an erroneous understanding of the nature of the overlap area; that under Section 307(b) Open Media's proposed new service to Chicago is to be preferred over NIU's duplicative service to Rockford; and that the station from which Open Media would receive interference, WAUS(FM), Berrien Springs, Michigan, would itself receive interference from yet another station. Accordingly, Open Media seeks to have the staff ruling vacated, grant of its requested waiver of Section 73.509 of the Commission's Rules, and *nunc pro tunc* acceptance of its application.

4. In its opposition, NIU argues that: Open Media's failure to comply with the Commission's rules is fatal and that waiver is not warranted because Open Media's inability to cover Chicago does not make other sites unavailable; the non-technical public service arguments should be ignored and should not be substituted for purely technical allocations questions; Open Media's application has not been subject to disparate treatment as evidenced by the fact that NIU/REBF's earlier application for a new FM facility at Rockford, Illinois had been returned because the proposal would receive objectionable interference to 1.3 percent of its protected 60 dBu contour;[3] and, that Open Media's non-technical, service related arguments are irrele-

[1] By letter dated January 12, 1988, the staff returned an earlier filed application of NIU/REBF for this facility. *See Letter to Mr. Michael Lazar from Dennis Williams, Chief, FM Branch, Audio Services Division* (8920-WED).

[2] Previously, on January 20, 1988, Open Media had filed a request for waiver of Section 73.509(a) of the Commission's Rules and application for the same facility (ARN-880120MF). That waiver request was denied and Open Media's application was returned on April 20, 1988. *See Letter to Open Media Corporation from Dennis Williams, Chief, FM Branch, Audio Services Division* (8920-WJG). Since this first application was returned and not denied or dismissed with prejudice, the staff determined that Open Media's May 27, 1988, application did not violate Section 73.3519 (Repetitious applications) of the Commission's Rules. *See Letter to Open Media Corporation from Larry D. Eads, Chief, Audio Services Division*, dated May 26, 1989 (8920-DT) (*"Eads letter"*).

[3] *See* n.1

vant and seek to shift the focus of inquiry away from the only proper issue, namely the acceptability of Open Media's application under Section 73.509 of the Commission's Rules. In summary, NIU argues that Open Media's voluntary non-compliance with Section 73.509 of the Commission's Rules militates against the requested relief and mandates affirmance of the staff action.

5. Open Media's application for review is essentially a restatement of arguments previously considered and rejected by the staff. *See Eads letter*. There the staff, citing *Board of Education of the City of Atlanta*, 48 RR 2d 637, 639 (1980), correctly noted that increased coverage at the expense of objectionable interference alone does not justify a waiver of the FM allocations rules. A comparison between the number of people served and the number precluded is not now and has never been the pertinent standard for judging the preclusionary effect of a NCE-FM proposal. It is the overall scheme of NCE-FM allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and a lesser coverage with no prohibited overlap on the other, the Commission favors the latter. *See Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

6. Moreover, citing *ICBC Corporation v FCC*, 716 F.2d 926 (D.C. Cir. 1983), the staff properly rejected Open Media's argument which focused on its providing the "first minority/female public radio service." Initially, the staff correctly noted that Open Media made no showing of a deficiency of NCE service to Chicago such that a waiver of the technical rules (which form the basis for the Commission's NCE-FM allocations scheme) was necessary to permit a basic level of NCE-FM service and therefore was warranted. Further, even though Open Media seeks to achieve what it believes to be a commendable objective, it is well established that our policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming is a rational implementation of our mandate to "[m]ake such regulations not inconsistent with law as [we] may deem necessary to prevent interference between stations...." 47 U.S.C. Section 303(f). This policy has been approved by the courts. *See e.g. ICBC, supra; North Texas Media, Inc. v FCC*, FCC 84-456 (released October 5, 1984), *aff'd* 778 F.2d 28 (D.C. Cir. 1985); *Walter F. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter P. Faber, Jr. v. FCC*, No. 91-177 (D.C. Cir. June 4, 1992).

7. We further find that Open Media's supplemental public interest showing describing the history, planning and participation of its members in filing its application to be similarly unavailing. Simply stated, the fact that the applicant put in a great deal of time and effort to develop an application is not a consideration in evaluating a waiver and does not alter the staff's proper conclusion that Open Media failed to justify its requested waiver of Section 73.509 of our Rules. Since the waiver was not otherwise justified, Open Media's application was properly returned and Open Media is not a qualified applicant entitled to comparative consideration. It is well established that the Commission need not hold a hearing on applications it rejects for failing to meet its technical acceptance rules. *Columbia Communications Corporation v. FCC*, 832 F. 2d 189, 193 (D.C. Cir. 1987), citing *Storer Broadcasting*, 351 U.S. at 202, 205, 76 S. Ct. at 770, 771-72 (1950).

8. To the extent that Open Media argues that the staff's action is inconsistent with Commission precedent, we disagree. The staff properly concluded that our action in changing the method of calculating interference from a ratio to an overlap basis did not effectuate a policy change towards waivers of Section 73.509(a). *See Eads letter* at n.2. Moreover, the staff also correctly distinguished the cases cited by Open Media in support of its waiver request. With respect to *New Covenant Educational Ministries, Inc.*, No. 1982, released January 23, 1984 (M.M. Bur.) we have subsequently overruled the staff's holding therein which allowed applicants to negotiate acceptable interference. In our *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5361 (1991), we established that we were the sole arbiter in determining interference standards and disallowed applicants from negotiating interference standards on a case-by-case basis. Therein, we further noted that one station's acceptance of interference would preclude some future facility changes by the station which causes the interference.[4] Furthermore, *New Cove-nant* involved third adjacent channel overlap, whereas this case involves first adjacent channel overlap. In *Educational Information Corporation*, 6 FCC Rcd at 2208, we distinguished first-adjacent channel overlap from second- or third-adjacent channel contour overlap:

> Overlap of co-channel or first adjacent channel signals is a more serious matter since the interference that may occur results in the loss of service over a wide area. Second or third adjacent channel overlap may result in the replacement of one signal by another (not the complete loss of service) and is confined to a very small area around the transmitter of the interfering station. In addition, the potential for such interference to occur depends to a great extent on the quality of the receivers used within the affected area.

Finally, we note that in *New Covenant* the staff waived as *de minimis* third adjacent interference within 2.1% of the protected service area, whereas in the instant case applicants seek a waiver of first adjacent interference within 6.9% of the protected service area. In short, the *New Coven ant* decision, to the extent it remains viable, is not analo-

[4] Open Media's argument that the staff ruling was based on an erroneous understanding of the nature of the overlap area is decisionally insignificant. Though the staff's description of the interference area as "consist[ing] of the heavily populated cityscape of Chicago" may have been exaggerated, the fact is that Open Media's own exhibit (Appendix B) establishes that 35,494 people will be within the area of overlapping contours. Clearly the area of overlap cannot be characterized as uninhabitable (*e.g.* covered by a lake), which has been a consideration in previous waivers. Finally, there is no significance to the fact that the station from which Open Media would receive interference receives interference from yet another station, as alleged by Open Media.

gous to the circumstances presented here. We conclude that a waiver in this case on grounds that the proposed overlap is *de minimis* is not warranted.

9. In summary, the operative facts are that Open Media's noncompliance with Section 73.509(a) of the Commission's Rules is voluntary and that Open Media has failed to demonstrate its entitlement to a waiver. Absent such a demonstration, its application was properly returned. Accordingly, we affirm the staff action.

10. *Reconsideration of Grant of NIU/REBF Application.* In its petition for reconsideration, Open Media argues that the staff violated its *Ashbacker*[5] rights and Section 73.3591 (Grants without hearing) of the Commission's Rules in making an *ex parte* grant of a construction permit to NIU/REBF. Open Media also alleges that NIU/REBF misrepresented and failed to demonstrate its financial qualifications, failed to comply with Section 1.65 of the Commission's Rules and violated the Commission's *ex parte* rules. Open Media further argues that grant of the NIU/RBEF application violates Section 307(b) of the Communications Act of 1934, as amended, as well as Sections 73.3517 (Contingent applications), 73.3518 (Inconsistent or conflicting applications) and 73.3520 (Multiple applications) of the Commission's Rules and is contrary to public policy. Finally, petitioner claims that inquiry is warranted to determine whether NIU/REBF falsely stated its intended community of license.

11. We deny reconsideration for the following reasons. Initially, there is no violation of Open Media's *Ashbacker* rights nor violation of Section 73.3591 of the Commission's Rules. In its letter issuing the construction permit to NIU/REBF while Open Media's application for review of the dismissal of its application was pending, the staff cited *Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987). Contrary to Open Media's contentions, we find that case to be apposite. *Meridian* holds that as a matter of law and Commission application processing policy, grant of an application cannot become final until the petition for reconsideration or application for review challenging dismissal of a mutually exclusive application is adjudicated. Simply stated, the cloud over the granted application will not dissipate until reconsideration or review is granted or denied. Thus, the grant to NIU/REBF does not prevent Open Media from having its application for review decided by the Commission and NIU/REBF are on notice that they proceed to construct at their own risk. Indeed, at page 4 of the January 23, 1990, construction permit to NIU/REBF the following statement appears:

> The issuance of this permit is conditioned on the outcome of the application for review filed by Open Media Corporation. Accordingly, any construction undertaken pursuant to this permit is at the permittee's sole risk.

Thus, Open Media's *Ashbacker* rights were not violated by issuance of the construction permit to NIU/REBF. Moreover, since Open Media has not been prejudiced by the grant of the construction permit, its allegations with respect to noncompliance with Section 73.3591 of the Commission's Rules are immaterial. Similarly, to the extent that there may have been a technical violation of the Commission's *ex parte* rules in that Open Media was not sent a copy of the January 23, 1990, construction permit issued to NIU/REBF, it was harmless error. We note that a Public Notice (Report No. 20776) of the action granting the construction permit was released on January 29, 1990. Accordingly, Open Media was not prejudiced as is evidenced by the fact that it timely filed its petition for reconsideration.[6]

12. We also reject Open Media's allegations that NIU/REBF was not financially qualified, misrepresented facts and failed to comply with Section 1.65 of the Commission's Rules with respect to its financial qualifications. NIU/REBF, in their application, answered "no" to the question about their dependence upon a Public Telecommunications Facilities Program ("PTFP") grant. However they apparently had also applied for a PTFP grant. The staff interpreted the application for a PTFP grant as implying some degree of financial dependence on a PTFP grant to establish NIU/REBF's financial qualifications. Accordingly, the Chief, FM Branch, in a letter dated November 16, 1989, asked NIU/REBF to provide an amendment demonstrating that it was financially qualified. In its response dated December 5, 1989, NIU/REBF noted that the inquiry was based upon an "erroneous factual assumption" namely, that NIU/REBF had indicated that it was dependent "on a Federal matching grant from the Public Telecommunications Facilities Program of the National Telecommunications and Information Administration (NTIA)." To the contrary, NIU/REBF stated that the applicant was not dependent on an unfunded PTFP grant to construct and operate its facility and that it had so stated in its application. Furthermore, in response to Open Media's instant petition, NIU reiterated that NIU/REBF has been financially qualified at all times, and has the requisite funds to construct and operate a facility on Channel 213 without revenue, independent of any PTFP funding. Open Media's attempts to challenge NIU/REBF's financial qualifications and to charge NIU/REBF with misrepresenting facts by referring to NIU/REBF's applications for funding from PTFP, and alleging that these actions are inconsistent with the NIU/REBF affirmation of being financially qualified, do not raise specific allegations of fact warranting further inquiry. An application filed with us specifying that it does not depend upon NTIA/PTFP funding does not preclude and is not inconsistent with a separate application to NTIA for a PTFP grant that may include equipment and facilities in addition to the facilities specified in its FCC application. NIU/REBF avers that such is the case here.

13. As in its application for review challenging the dismissal of its application, Open Media alleges that grant of NIU/REBF's application violated Section 307(b) of the Communications Act of 1934, as amended. As noted in paras. 5-9, *supra*, the dispositive facts are that Open Media failed to demonstrate its entitlement to a waiver of Section 73.509(a) of the Commission's Rules and thus was not qualified for comparative consideration. Accordingly, we again affirm the staff ruling that absent acceptance and designation, Open Media was not entitled to a hearing on

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[5] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

[6] Similarly, NIU/REBF's failure to serve Open Media with its December 5, 1989, response to the Commission inquiry does not raise a substantial and material question of fact. It is well established that where an *ex parte* violation is a single incident, which is not repeated and does not cause prejudice, it does not raise a substantial and material question of fact warranting further inquiry.

the comparative Section 307(b) ramifications of its proposal. Furthermore, Open Media's allegation that NIU's proposal in a separate proceeding to co-locate a Channel 202 operation with the existing Channel 207 facility licensed to Northern Illinois University (WNIU-FM) violates the Commission's multiple ownership rules and is germane to this proceeding is simply wrong. Section 73.3555(f) (Multiple ownership) of the Commission's Rules exempts NCE-FM stations from the strictures of our multiple ownership rules.

14. Open Media further alleges that NIU/REBF does not put a 1mV/m signal over a majority of Rockford, its proposed community of license and therefore that inquiry is warranted as to whether NIU/REBF has falsely stated its community of license. We reject this contention. The note to Section 73.315 (FM Transmitter location) of the Commission's Rules exempts NCE-FM stations operating on reserved channels (Channels 200-220) from the city-grade requirements of Section 73.315. Accordingly, the requested investigation is not warranted.

15. Finally, Open Media claims that grant of the NIU/REBF application for Channel 213 would be contrary to Sections 73.3517, 73.3518 and 73.3520 of the Commission's Rules because NIU and REBF have each already filed applications for NCE-FM stations to serve Rockford on Channel 202.[7] This contention is rejected. The parties have entered into an agreement of understanding, the purpose of which is to determine which frequency each would obtain. NIU/REBF have explained that the purpose of their joint application for Channel 213 was to resolve the mutual exclusivity between their respective applications for Channel 202. Pursuant to the agreement, should the joint application for Channel 213 pass a cut-off list unopposed, REBF would withdraw from that joint applicant, and NIU would request the dismissal of its application for Channel 202. [8]

16. As noted, Section 73.3555(f) of the Commission's Rules provides that the multiple ownership rules do not apply to NCE-FM stations. Accordingly, it is clear that both NIU and REBF may each have more than one noncommercial educational station in the Rockford market. With respect to the alleged violation of Section 73.3517 of the Commission's Rules, there are no contingent applications. If either NIU or REBF had filed individually for Channel 213, the application could have been granted. The only reason that neither the NIU nor REBF application for Channel 202 could have been granted was because they were mutually exclusive with one another for that channel. Thus, there is no violation of Section 73.3517. Furthermore, the purpose of Section 73.3518 "is to avoid the waste of Commission resources, prejudice to other applicants, and delay of service which arises when the Commission must process applications by the same person or entity." *Valley Broadcasting Co.*, 58 RR 2d 945, 948(1985) It is designed to prevent the filing of multiple applications "not all of which can be granted." *Id.* Since we have before us NCE-FM applications, all of which may be granted, Section 73.3518 is simply inapplicable. Nor is there any violation of Section 73.3520 of our Rules. Rule 73.3520 is premised on there being a limit to the number of stations which may be owned by any one licensee in the same community. However, since the multiple ownership rules do not apply to NCE-FM operations, neither NIU nor REBF is precluded from owning and operating more than one NCE-FM facility in the market. Thus, it follows that each may have more than one application pending at the same time for a given market. Accordingly, the proposals of NIU and REBF do not violate Sections 73.3517, 73.3518 and 73.3520 of our Rules.[9]

17. In summary, Open Media has failed to demonstrate that reconsideration of the grant of NIU/REBF's application is warranted.

CONCLUSION

18. ACCORDINGLY, IT IS ORDERED, That the application for review filed by Open Media on June 23, 1989, and petition for reconsideration filed by Open Media on February 28, 1990, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[7] The Administrative Law Judge dismissed NIU's application and granted REBF's application for Channel 202 by *Memorandum Opinion and Order*, FCC 90M-3525, released November 6, 1990. However, a construction permit for the facility was not issued until July 29, 1991. On June 17, 1991, REBF filed an application to assign the construction permit to Faith Academy d/b/a WFEN. The assignment application was granted on October 2, 1991, and the transaction was consummated on October 8, 1991.

[8] Although Open Media's timely filed application created doubt about bringing NIU and REBF's plan to fruition, the return of the Open Media application made implementation of the plan possible. However, subsequent events have made the plan moot, as explained in n.7.

[9] Open Media claims that co-location of the NIU/REBF directional antenna for Channel 213 at 127.4 meters above ground on the same tower as NIU's proposed directional antenna for Channel 202 at 128.7 meters above ground is physically impossible and in violation of the Commission's rules. However, the staff examined NIU's Channel 202 application and found it to be in compliance with the Commission's technical rules. Hence, Open Media's contention is rejected. Moreover, since NIU has dismissed its application for Channel 202, the matter is now moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 93-155

In re Application of

RICHARD BOTT II (Assignor) File No. BAPH-920917GO

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction
Permit of Station KCVI(FM),
Blackfoot, Idaho

HEARING DESIGNATION ORDER
AND
NOTICE OF OPPORTUNITY FOR HEARING

Adopted: June 1, 1993; Released: June 15, 1993

By the Commission:

1. The Commission has before it: (1) the captioned application to assign the construction permit for unbuilt Station KCVI(FM), Blackfoot, Idaho, from Richard Bott II ("Bott") to Western Communications, Inc. ("Western"); and (2) a Petition to Deny the application filed October 26, 1992 by Radio Representatives, Inc. ("RRI"). Bott submitted an Opposition to the petition, to which RRI, in turn, filed a Reply. Bott subsequently filed a "Request For Leave to Respond And Response."[1]

2. *Background.* The mutually exclusive applications of Bott, RRI, and another applicant were designated for comparative hearing on July 1, 1987. *Richard P. Bott, II,* 2 FCC Rcd 3897 (M.M. Bur. 1987). During the hearing, Bott received an integration preference based on his assertions that he would move to Blackfoot and serve as full-time general manager. Bott's construction permit application was granted and that of RRI denied on the basis of the integration preference.[2] Although RRI appealed to the Review Board and the Commission, the Administrative Law Judge's determination was upheld. *Richard P. Bott, II,* 4 FCC Rcd 4924 (Rev. Bd. 1989); *Richard P. Bott, II,* 5 FCC Rcd 2508 (1990). RRI's subsequent appeal to the United States Court of Appeals, District of Columbia Circuit, was also denied. *Radio Representatives, Inc. v. FCC,* 926 F.2d 1215 (D.C. Cir. 1991) (*aff'd by judgment*).[3] Bott was issued a permit on December 18, 1991. Bott now seeks to assign the permit.

3. *Pleadings.* RRI contends in its petition to deny that the assignment application must be designated for hearing pursuant to 47 C.F.R. §73.3597(a)[4] because Bott proposes to assign his construction permit within one year of its grant, thus abandoning his commitment made at hearing to relocate to Blackfoot and integrate ownership and management. In response, Bott states that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format. He states that it was only "several months" subsequent to the Court of Appeals affirmation of action granting his application, while he was arranging to manage KCVI, that circumstances changed. Specifically, Bott says that only then did he learn that Station KRSS in nearby Chubbuck, Idaho had adopted an identical format. According to Bott, this development "dramatically" changed the market situation, as two such similar operations could not be supported. In light of this "significant" change in circumstances, states Bott, he decided to accept an assignment offer from Western.

4. Procedurally, Bott also argues that RRI's status as a former competing applicant is insufficient to confer RRI standing to file a petition to deny. In reply, RRI maintains that since it had filed a "Petition to Reopen the Record" with the Commission on October 26, 1992 and a "Petition for Recall of the Mandate of the Court and for Remand to Open the Record" with the Court of Appeals on October 28, 1992, it remained a competitor with Bott and thus has standing pursuant to §309(d) of the Communications Act of 1934, as amended. RRI next argues that its "Petition" can in any event be considered as an informal objection.

5. RRI also alleges that, in light of Bott's abandonment of his integration pledge and promise to relocate to Blackfoot, a grant of the assignment request without hear-

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[1] According to Bott, this pleading is tendered "to correct certain factual misstatements" in the Reply and to assist the Commission. While this pleading is unauthorized, we will consider the information contained therein.

[2] The application of Claire Marie Ferguson was also denied, and no request for review of that action was taken. *Initial Decision,* 3 FCC Rcd 7094 (ALJ 1988).

[3] After the filing of the subject assignment application, on October 26, 1992, RRI filed a "Petition to Reopen the Record" with the Commission, and on October 28, 1992, RRI filed with the Court of Appeals a "Petition for Recall of the Mandate of the Court and for Remand to Reopen the Record." On December 23, 1992, the court denied this latter petition, but "without prejudice to refiling, by either party, upon completion of the assignment proceeding before [the Commission]." *Radio Representatives, Inc. v. FCC,* No. 90-1227 (D.C. Cir. December 23, 1992).

[4] That section provides, in relevant part, that where a licensee or permittee seeks to assign a station "which has been operated on-air ... for less than one year," designation of the assignment application for hearing on appropriate issues is required unless the Commission finds that: (i) the permit was not issued through the Minority Ownership Policy or after a comparative hearing; (ii) the application involves an FM translator or booster station only; (iii) the application involves a *pro forma* assignment or transfer; (iv) the assignor demonstrates that, due to death, disability, or other "changed circumstances," grant of the assignment would serve the public interest; and (v) the application proposes assignment or transfer to a minority controlled entity.

ing would undermine the Commission's licensing process. In this regard, RRI indicates that in a recent review of its comparative hearing processes, the *Report and Order in re Reform of the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 160 (1990), the Commission specifically required that applicants commencing station operations provide information concerning fulfillment of representations made in the course of comparative hearings in order to insure at least a year's compliance. In addition, RRI notes that 47 C.F.R. §1.68 provides that failure to abide by obligations contained in a permit application requires designation for hearing of an application for a covering license. RRI asserts that the integration credit is only applicable where the proposed principal participation is "permanent," citing *Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 190 (1965), and several Review Board decisions. Indicating that but for Bott's integration credit its own application would have been preferred, RRI says that, unlike Bott, it stands ready to implement service in conformance with its proposal.

6. RRI further states that Bott's failure to reveal that his integration promises were "contingent" on the financial viability of the proposed KCVI format constitutes a "fraud" on the Commission. It argues that a permit obtained pursuant to a comparative hearing cannot be "casually" assigned just because no profit will accrue to the assignor, citing *Eagle, Limited*, 7 FCC Rcd 5295, 5297 (1987) , and *TV-8*, 2 FCC Rcd 1218, 1220 (1987). In this regard, RRI argues that Bott's "changed circumstances" are insufficient and that to allow abandonment of an integration proposal where a specific format appears impracticable would be to subject the comparative process to abuse. According to RRI, changed financial circumstances do not warrant a transfer of Bott's permit. In this regard, RRI questions whether KCVI operating with the projected format would actually be at a competitive disadvantage *vis-a-vis* KRSS. Finally, RRI argues that a grant here will damage the integrity of the licensing processes. According to RRI, allowing the assignment of KCVI to a "white knight" is contrary to Commission policy, citing *Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), and "damaging" to the public interest.

7. In opposition, Bott maintains that RRI's reliance on Section 73.3597(a) is misplaced, as that rule applies only to "operational" stations and not to unbuilt facilities such as KCVI. According to Bott, subparagraph (4) does not mandate a hearing in the face of changed circumstances arising subsequent to a permit grant, and the new KRSS format qualifies as a changed circumstance affecting a permittee pursuant to that part of the rule. Bott also asserts that a grant of the captioned assignment application will conform to the public interest mandate of subparagraph (4). Bott asserts that he has perpetuated no fraud on the Commission and that RRI presents no evidence for its "unfounded" allegations, and further states that a grant of the proposed assignment will not adversely affect the integrity of the Commission's licensing processes. According to Bott, there is no motive to endure a comparative hearing simply to recoup expenses. Bott argues that the noted change in market-format circumstances should not result in a penalty to him in the amount of his investment in KCVI. Finally, he argues that the public interest would be ill-served by denying the assignment and thereby delaying the introduction of a new service.

8. *Discussion.* Preliminarily, given that the adjudicatory proceeding in which RRI was a party is final, we find no basis to grant RRI standing to file a petition to deny. Accordingly, we will treat this as an informal objection. Contrary to RRI's assertion, Section 73.3597(a) of the Commission's Rules is inapplicable to the instant situation. RRI has cited *Urban Telecommunications Corp.* (*"Urban"*), 7 FCC Rcd 3867 (1992), and *TV-8, Inc.* (*"TV-8"*), 2 FCC Rcd 1218 (1987) , arguing that the text of §73.3597(a) does not restrict application of that rule to "constructed" facilities and that there is no good policy reason for a "restrictive" reading. In *TV-8*, a losing applicant in a comparative hearing protested an application to transfer control of a television permittee. As here, the successful applicant prevailed due to a preference received in the course of the hearing and, as does RRI, the objector argued that the rule applies to an unbuilt facility. Faced with these circumstances, the Commission clearly determined that §73.3597(a) does not apply to an unbuilt station. 2 FCC Rcd at 1220. Nonetheless, the Commission has clearly indicated its basic concern with the integrity of its licensing process. *See Urban*, 7 FCC Rcd at 3870.[5]

9. Bott does not dispute, however, the contention that his application for a construction permit prevailed essentially on the basis of his integration proposal. An examination of the record in the hearing proceeding reveals that Bott, in the course of prosecuting his permit application, unambiguously, unconditionally, and repeatedly pledged to relocate to Blackfoot from his home in Kansas City, Missouri and to act as full-time (at least forty hours per week) general manager of the proposed facility.[6] The hearing record does not reveal any qualification to Bott's pledges, such as being contingent on the practicality of introducing a commercial religious or any other particular format. Moreover, in his testimony at hearing, Bott made the following statements:

> Q Isn't it true that you also intend to engage in a (religious-orientated) format for the Blackfoot facility?

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[5] With respect to RRI's argument predicated on §1.68, that rule requires designation of an application for a *covering license* in situations where the permittee has not abided by the terms, conditions, and obligations in its permit application and grant. Thus, that provision clearly is inapplicable to the *assignment* application at issue here.

[6] *See, e.g., Initial Decision* at 7094; Bott Exhibit 4 introduced at hearing December 7, 1987 (TR 19); Bott's testimony at hearing (TR 24, 92); Bott's September 11, 1987 *Integration Statement* filed with the presiding Administrative Law Judge; Bott's oral testimony wherein Bott stated his intent to leave his father's broadcast business in order to operate his own station (TR 56) and stated that he had no plans to sell his proposed station and did intend to live in Blackfoot indefinitely (TR 77-78); Bott's February 8, 1988 *Proposed Findings of Fact and Conclusions of Law* at paragraphs 1, 11-12, 70-71; February 19, 1991 *Response To Motion to Remand To Reopen The Record* filed with the Court of Appeals; *Statement Of Richard P. Bott, II* attached to October 26, 1992 *Petition To Reopen The Record.*

> A No, that's not necessarily true. I've not decided exactly the type of format, the type of music or whatever that I would use in that facility. It would be a format tailored to that particular market and the needs of that community.

(TR 61).

> A ....I've not chosen the exact format....

(TR 95). However, as previously noted in Paragraph 3, *supra*, Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format and that KRSS' adoption of an identical format dramatically changed the local market situation.

10. Insofar as Bott, by failing in any way to qualify his integration pledge, led the Commission to grant his permit application, there arises a question as to whether he has misrepresented facts or lacked candor, either in his statements made during the course of the hearing, or in the instant assignment proceeding. We believe that *any* authorization obtained under circumstances of misrepresentation or lack of candor undermines the integrity of the Commission's licensing processes, and thus it is proper to inquire into why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later. The Commission "must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations. *WOKO, Inc.*, 329 U.S. 223 (1946); *WMOZ, Inc.*, 36 FCC 202 (1964); *affirmed* 3 FCC 2d 637 (1966)." *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). *See also Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210-11 (1986), *recon. denied*, 1 FCC Rcd (421 (1986), and *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *affirmed*, 5 FCC Rcd 4596 (1990). Therefore, we believe that designation of the captioned application for evidentiary hearing on pertinent issues is appropriate.

11. RRI's opposition pleading also raises an additional question. Although Bott attempts to justify his decision not to move to Blackfoot and operate KCVI on changed circumstances, *i.e.* the nonfeasability of his planned format in light of KRSS' prior introduction of such programming, the assertions of RRI in its Reply call into question Bott's rationale for assigning rather than constructing KCVI. Specifically, RRI notes that KCVI would serve an area 15.2 times that of KRSS and 2.55 times as many persons. Bott does not dispute the conclusion that KCVI will serve a substantially greater area and population than KRSS, although it does take issue with RRI's computation.[7] In light of this, it appears that the credibility of Bott's "justification" for not proceeding with his announced plans for KCVI is further eroded.

12. Moreover, we believe that unanticipated competitive circumstances are not sufficient to justify abandonment of the integration proposal and approval of the assignment application. *Triangle Publications, Inc.*, 29 FCC 315, 318 (1960), *affirmed, sub nom. Triangle Publications, Inc. v. FCC*, 291 F.2d 342 (1961), *PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240 (1991). Although RRI raised this point, Bott cites no contrary authority, and none is apparent. Further, it appears irrelevant whether the consideration Bott receives merely covers his expenses in prosecuting his permit application to date. To allow Bott, in effect, to renege on his critical integration pledge solely on the basis that the station would not be as profitable as he once hoped would make a mockery of the comparative licensing process.

13. *Conclusion.* We have carefully reviewed the pleadings and related matters of which official notice may be taken involving grant of Bott's construction permit, and we believe that there are substantial and material questions of fact concerning whether Bott, in the course of the comparative licensing proceeding or the instant assignment proceeding, misled or lacked candor with the Commission about his intention to move to Blackfoot and act as full-time general manager of his proposed station.[8] Since those questions cannot otherwise be resolved, and inasmuch as this precludes a finding pursuant to §309(a) of the Communications Act that the public interest, convenience, and necessity would be served by a grant of the captioned assignment application, that application must be designated for hearing pursuant to §309(e) of the Act.

14. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned application IS DESIGNATED FOR HEARING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issue:

> (a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.
>
> (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.
>
> (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

15. IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the assignment application, it shall be determined pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE in an amount not to exceed $250,000 shall be issued against Bott for willful and repeated violations of Section 73.1015 (submitting truthful written statements and responses to the Commission).

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[7] Bott points out that KRSS has commenced operations with its authorized Class C2 facilities (BPH-900612IA, issued on May 8, 1992). KCVI, as a Class C facility, would serve an area 3.1 times the size and a population 2.1 times greater than that of KRSS' C2 operation, according to Bott.

[8] Nothing in the record or pleadings presently appears to indicate that Western, the proposed assignee, has acted in a manner warranting further inquiry.

16. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

17. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, Bott both proceed with the initial presentation of evidence and have the burden of proof with respect to all issues.

18. IT IS FURTHER ORDERED, that, in the event: (i) dismissal of the captioned application is requested; (ii) Bott fails to file a written appearance pursuant to paragraph 21, *infra;* or (iii) a finding adverse to Bott is made with respect to issue (b), above, the presiding Administrative Law Judge is hereby directed to issue an order to show cause why an order of revocation of the construction permit for unbuilt station KCVI(FM) should not be issued.[9]

19. IT IS ORDERED, That the Informal Objection filed October 26, 1992 by Radio Representatives, Inc. IS GRANTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service SHALL BE ADDRESSED to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the Chief, Data Management Staff, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, Bott and Western, pursuant to Section 1.221(c) of the Commission's Rules, in person or by their respective attorneys, within 20 days of the mailing of this Order, SHALL FILE in triplicate a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] The Commission reserves its right to refile with the D.C. Circuit Court of Appeals a petition for recall of mandate and for remand pursuant to the Court's December 23, 1992 order. *See* n.3, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-160

In the Matter of

Amendment of Section 73.202(b), RM-8238
Table of Allotments,
FM Broadcast Stations.
(Window Rock, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1993; Released: June 16, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Western Indian Ministries, Inc. ("petitioner"), permittee of Station KHAC-FM, Channel 276A, Window Rock, Arizona, seeking the substitution of Channel 274C1 for Channel 276A and modification of its authorization accordingly to specify operation on the higher powered channel. Petitioner failed to state its intention to apply for Channel 274C1 if allotted to Window Rock, and is requested to do so in its comments.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 274C1 for Channel 276A at Window Rock since it could provide an enhanced service to the community. Channel 274C1 can be allotted to Window Rock in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 20.9 kilometers (6.8 miles) southeast of the community to avoid a short spacing to the construction permit for Station KMYI(FM), Channel 275C, Kirtland, New Mexico.[2]

3. The petitioner's modification request at Window Rock conforms with the provisions of Section 1.420 of the Commission's Rules. Therefore, we shall propose to modify the petitioner's Class A authorization for Station KHAC-FM without entertaining competing expressions of interest in the use of Channel 274C1 at Window Rock, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Window Rock, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Window Rock, Arizona	241C1, 276A	241C1, 274C1

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the permittee of Station KMYI(FM), as follows: Jeff and Joella Thomas, 3207 Espacio Street, Farmington, New Mexico 87401.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Western Indian Ministries, Inc.
Attn: Laurence Harper, General Director
P.O. Box F
Window Rock, Arizona 86515

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that

[1] Moreover, although petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] Coordinates used for Channel 274C1 at Window Rock are 35-35-00 and 109-02-00. Use of this site restriction does not nullify a short spacing to the allotment coordinates for Channel 275C at Kirtland at 37-01-45 and 108-10-36. Therefore, the issuance of a license to petitioner for Channel 274C1 at Window Rock may be withheld until Station KMYI(FM) is granted a license at the transmitter site specified in its construction permit (File No. BPH-910226MB). The permittee of Station KMYI(FM) will be served with a copy of this *Notice*.

no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-158

In the Matter of

Amendment of Section 73.202(b), RM-8239
Table of Allotments,
FM Broadcast Stations.
(Hazlehurst, Utica and
Vicksburg, Mississippi)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 25, 1993; Released: June 16, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by St. Pe' Broadcasting ("petitioner"), requesting the substitution of Channel 265C3 for Channel 225A at Utica, Mississippi. Petitioner also requests modification of its license for Station WJXN(FM) to specify operation on the higher class channel. Petitioner further requests the substitution of Channel 225A for Channel 265C3 at Hazlehurst, Mississippi, and substitution of Channel 267A for Channel 266A at Vicksburg, Mississippi, to accommodate the upgrade at Utica. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Utica with a wide coverage area FM service. Petitioner notes that Channel 265C3 can be allotted to Utica, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 267A is substituted for Channel 266A at Vicksburg, Mississippi, and Channel 225A is substituted for Channel 265C3 at Hazlehurst.[1] Channel 266A at Vicksburg is presently licensed to Station WBBV-FM. The proposed substitution at Vicksburg can be accomplished in compliance with the minimum distance separation rquirements at the current site for Station WBBV-FM.[2] Station WMDC-FM, Hazlehurst, operates on Channel 265A. Channel 225A can be substituted for Channel 265A at Hazlehurst, Mississippi, in compliance with the Commission's spacing requirements at the current site for Station WMDC-FM.[3] Although Station WMDC-FM requested and was granted authority to operate on Channel 265C3, effective June 15, 1990, the station has never filed a Form 301 for Channel 265C3. *See Report and Order* (MM Docket No. 89-411), 5 FCC Rcd 2817 (1990). On March 16, 1993, the Commission sent a letter to Copiah County Broadcasting Company, the licensee of Station WMDC-FM, advising it that unless an FCC Form 301 application for a construction permit for Class C3 facilities is filed within 30 days of the date of the letter, it would be made a party to the rulemaking proceeding and the allotment could be downgraded. Further, the licensee was notified that extensions of the 30 day period, during which the construction permit application must be filed, would not be granted. Copiah County Broadcasting Company did not file a Form 301 to upgrade Station WMDC-FM to Class C3 facilities. Therefore, Copiah County Broadcasting Company is deemed to have abandoned its interest in the Class C3 allotment. Upon termination of this proceeding, we shall modify the license of Station WMDC-FM to specify operation on Channel 265A or 225A depending on the action taken in this docket.

3. We shall propose to modify the license for Station WJXN(FM), Channel 225A, as requested by the petitioner, to specify operation on Channel 265C3. However, in accordance with Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent class channel is also allotted.

4. Whenever an existing licensee or permittee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it will reimburse the affected station for costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station WMDC-FM, Hazlehurst, and Station WBBV-FM, Vicksburg, for the reasonable costs in changing frequencies.

5. We believe the public interest would be served by proposing the substitution of Channel 265C3 for Channel 225A at Utica, Mississippi, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

	Channel No.	
City	Present	Proposed
Hazlehurst, Mississippi	265C3	225A
Utica, Mississippi	225A	265C3
Vicksburg, Mississippi	254C1, 266A, 294C	254C1, 267A, 294C

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Bishop Broadcasting, Inc., the licensee of Station WBBV-FM, Vicksburg, Mississippi, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 267A in lieu of Channel 266A.

[1] The coordinates for Channel 265C3 at Utica are 32-06-09 and 90-29-56.
[2] The coordinates for Channel 267A at Vicksburg are 32-21-34 and 90-50-08.
[3] The coordinates for Channel 225A at Hazlehurst are 31-53-34 and 90-24-08.

7. IT IS ORDERED, that pursuant to Section 316(a) of the Communications Act of 1934, as amended, Copiah County Broadcasting Company, licensee of Station WMDC-FM, Hazlehurst, Mississippi, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 225A in lieu of Channel 265C3.

8. Pursuant to Section 1.87 of the Commission's Rules, Bishop Broadcasting, Inc., and Copiah County Broadcasting Company, may not later than **August 9, 1993,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call upon Bishop Broadcasting, Inc. and/or Copiah County Broadcasting Company to furnish additional information. If Bishop Broadcasting, Inc. and/or Copiah County Broadcasting Company raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Bishop Broadcasting, Inc. and/or Copiah County Broadcasting Company will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Copiah County Broadcasting Company
Station WMDC-FM
902 Highway 51 North
Hazlehurst, Mississippi 39083

Bishop Broadcasting, Inc.
Station WBBV-FM
Rte 1, Box 159A
Vicksburg, Mississippi 39180

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Timothy K. Brady

P.O. Box 986

Brentwood, Tennessee 37027-0986

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-159

In the Matter of

Amendment of Section 73.202(b), RM-8240
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1993; Released: June 16, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Cloud Nine Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 292C2 for Channel 292A at Kalispell, Montana. Petitioner also requests modification of its construction permit (File No. BPH-910926MI) for Channel 292A to specify operation on Channel 292C2.[1] Petitioner provided an engineering study in support of the petition and indicated it would file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 292C2 can be allotted to Kalispell, Montana, consistent with the Commission's spacing requirements at petitioner's specified site.[2] Since Kalispell is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify petitioner's construction permit for Channel 292C2 in lieu of Channel 292A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Kalispell or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Kalispell, Montana	246C, 253C, 280C1, 292A	246C, 253C, 280C1, 292C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] The construction permit for Channel 292A at Kalispell was granted on April 15, 1993 and expires on October 15, 1994.
[2] The coordinates for Channel 292C2 at Kalispell are 48-10-34 and 114-20-53.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-270

In the Matter of

Amendment of Section 73.202(b), RM-8110
Table of Allotments,
FM Broadcast Stations.
(Liberty, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 26, 1993; Released: June 16, 1993

By the Chief, Allocations Branch:

1. At the request of Michael S. Celenza ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7604 (1992), proposing the allotment of Channel 271A to Liberty, New York, as the community's second local FM transmission service. Comments were filed by the petitioner reiterating his intention to apply for the channel, if allotted. Comments in opposition and a counterproposal requesting the allotment of Channel 271A to Jeffersonville, New York, were filed by Preston Mark and Susan Lea Pollack ("Pollacks").[1]

2. The Pollacks state that both the petitioner and the Commission have specified transmitter sites which are not of sufficient elevation to permit a station to provide Liberty with an unobstructed signal. They go on to state that the area surrounding Liberty is comprised of "extremely rugged" terrain and for that reason believe that no transmitter site exists from which a station could provide Liberty with the required 70 dBu city-grade signal.

3. Petitioner, in response, does not provide a showing that a transmitter site does exist from which a station could comply with the Commission's city-grade coverage requirements. Instead, it argues that the Commission should disregard the allegations of the Pollacks since the engineering study purporting to demonstrate the terrain shielding problem was not properly filed with their comments but rather incorporated in supplemental comments filed after the close of the initial comment period. In support, petitioner cites *Lincoln, Missouri, et al.*, 7 FCC Rcd 3015 (1992). However, should the opposition be considered, petitioner states that the terrain shielding study used coordinates which reflect a low-lying area "where no reasonable person would locate an antenna site to serve Liberty" and which are different from that proposed by either the Commission or the petitioner. Further, petitioner states that the Pollacks' study does not take into consideration "various combinations of height and power at various locations which would meet all protection requirements to existing stations and allocations."

4. After reviewing the pleadings before us, we find that Channel 271A cannot be allotted to Liberty in compliance with the Commission's technical requirements. A site theoretically complying with the Commission's minimum distance separation requirements can be found. However, a terrain profile analysis performed by the staff, using both the site coordinates proposed by the petitioner and by the Commission, shows that unobstructed line-of-sight service is not possible. Rather, severe shadowing would occur. Further, because of terrain obstructions between the theoretical transmitter site under consideration herein and Liberty, it does not appear possible for a Channel 271A station to provide the community with the required 70 dBu field strength signal. Finally, we believe that these conditions would prevail regardless of whether an antenna of up to 200 meters height above average terrain was used.

5. Accordingly, IT IS ORDERED, That the petition of Michael S. Celenza requesting the allotment of Channel 271A to Liberty, New York, IS DENIED.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Preston Mark and Susan Lea Pollack to allot Channel 271A to Jeffersonville, New York, IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The Pollacks' counterproposal is not acceptable for consideration since they failed to include an engineering study demonstrating that Channel 271A could be allotted to Jeffersonville in compliance with the Commission's minimum distance separation requirements. *See Big Spring, et al., Texas*, 7 FCC Rcd 4834 (1992) (we expect petitioners to submit, at a minimum, an engineering statement designating exact site coordinates and demonstrating compliance with all relevant domestic and international minimum spacing requirements; failure to do so may result in dismissal of the petition); *Springdale, Arkansas, et al.*, 4 FCC Rcd 674 (1988) (counterproposals must be technically correct and substantially complete when filed in order to afford all parties an opportunity to fully respond in reply comments). We have, however, accepted and considered that portion of their pleading which pertains to the proposed Liberty allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-155

In the Matter of

Amendment of Section 73.202(b),	RM-8020
Table of Allotments,	RM-8095
FM Broadcast Stations.	RM-8096
Blair, Nebraska; Ames, Alta, Denison, Lake City, Perry, Sac City and Storm Lake, Iowa[1]	

REPORT AND ORDER

Adopted: June 3, 1993; Released: June 16, 1993

By the Chief, Allocations Branch:

1. At the request of Sunrise Broadcasting of Nebraska, Inc. ("petitioner" or "Sunrise"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 7 FCC Rcd 4593 (1992), proposing the substitution of Channel 268C3 for Channel 292A at Blair, Nebraska, and the modification of Station KBWH(FM)'s license to specify operation on the higher class channel. To accommodate the allotment of Channel 268C3 to Blair, the *Notice* also proposed the modification of Station KAYL's license by substituting Channel 269C1 for Channel 268C1 at Storm Lake, Iowa, the modification of Station KDLS-FM's license by substituting Channel 286A for Channel 269A at Perry, Iowa, and the substitution of Channel 248A for unoccupied and unapplied for Channel 286A at Sac City, Iowa. Comments were filed by the petitioner, Perry Broadcasting ("Perry"), licensee of Station KDLS-FM, and Blair Communications ("BC"). Counterproposals were filed by Marjorie K. and Theodore H. Mahn ("Mahns")[2] requesting the allotment of Channel 248A to Alta, Iowa (RM-8095) and Ames Broadcasting Company ("ABC") requesting the substitution of Channel 286C3 for Channel 296A at Ames, Iowa, the modification of Station KCCQ's license to specify the higher class channel, the allotment of Channel 296C3 to Lake City, Iowa, and the substitution of Channel 256A for Channel 296A at Denison, Iowa, and the modification of Station KDSN(FM)'s license to specify operation on the alternate Class A channel (RM-8096).[3] Reply comments were filed by Northwest Iowa Broadcasting Corporation ("Northwest"), Sunrise, ABC, and Perry.

2. Sunrise reiterates its intention to apply for Channel 268C3 at Blair. It also restates its commitment to reimburse the licensees of Stations KAYL and KDLS-FM for the reasonable expenses incurred in the change of their operating channel. Perry agrees to the substitution of Channel 286A for Channel 269A at Perry and the modification of Station KDLS-FM's license accordingly, contingent upon the reimbursement of expenses by Sunrise. However, it requests that the antenna reference coordinates set forth in the *Notice* be modified to specify those of its pending application.[4] Northwest, licensee of Station KAYL-FM, Storm Lake, also agrees to the modification of its license to specify operation on Channel 269C1 in lieu of its present Channel 268C1.

3. Sunrise seeks a non-adjacent channel upgrade from Channel 292A to Channel 268C3. In this connection, Section 1.420(g) of the Commission's Rules states that a station's authorization may not be modified in rule making to specify a non-adjacent, higher class channel, if competing expressions of interest are received absent the allotment of an additional equivalent class channel for use by such parties. Recognizing this possibility, the *Notice* proposed the allotment of Channel 247C3 to Blair to accommodate such competing expressions of interest. In response, Blair Communications has stated an intention to apply for the channel, if allotted.

4. ABC requests the substitution of Channel 286C3 for Channel 296A at Ames, Iowa, the modification of Station KCCQ(FM)'s license to specify operation on the higher class channel, and the allotment of Channel 296C3 to Lake City, Iowa, as the community's first local FM service. ABC states that upgrading Station KCCQ to Channel 268C3 could enable the station to provide service to an additional 41,397 persons within a 2,279 square kilometer (880 square mile) area. In addition, the allotment of Channel 296C3 to Lake City, population 1,841 persons,[5] would provide a first local transmission service to the community as well as a new reception service to an additional 43,208 persons.

[1] The communities of Ames, Alta, Denison and Lake City, Iowa, have been added to the caption.

[2] Although the Mahns' counterproposal was signed and served on the petitioner, they failed to include an affidavit verifying that the statements contained in the counterproposal were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). However, in view of the fact that the Mahn's proposal can be accommodated without conflicting with any other pending request or allotment, we believe that the failure of the petitioners to verify their pleading should not result in the possible deprivation of first local FM service to Alta. *See Stuart and Boone, Iowa*, 5 FCC Rcd 4537 (1990).

[3] Public Notice of the counterproposals was given on October 1, 1992, Report No. 1909.

[4] Pursuant to application File No. BPH-910812IH, Perry has requested that its transmitter site be changed to North Latitude 41-50-03 and West Longitude 94-02-12. Although Perry states that these coordinates reflect the station's current tower site, Commission records show that the application is still pending and that the station's licensed site is that specified in the *Notice* herein (41-49-58; 94-02-15). However, since the alternate channel proposed for use by Perry can be used at the site specified in its outstanding application, we will change the reference coordinates as requested.

[5] Population figures are taken from the 1990 U.S. Census.

ABC states that it will apply for Channel 268C3, if allotted to Ames, as well as Channel 296C3, if allotted to Lake City. To accommodate the allotments at Ames and Lake City, ABC requests the modification of Perry's Station KDLS-FM to specify operation on Channel 288A instead of Channel 286A, as proposed by Sunrise. It also requests that an *Order to Show Cause* be issued to Station KDSN(FM), Denison, Iowa, proposing the modification of its license by substituting Channel 256A for Channel 296A.

5. ABC is seeking a non-adjacent channel upgrade at Ames. However, ABC states that Lake City can obtain a Class C3 allotment only if Channel 296A is deleted from Ames. Therefore, it argues that competing expressions of interest in use of Channel 286C3 should not be accepted since the proposal constitutes an incompatible channel swap and thus is entitled to the same protection as if ABC requested an upgrade to an adjacent channel.[6]

6. The Mahns request the allotment of Channel 248A to Alta, Iowa, as the community's first local aural service. They state that Alta, located in Buena Vista County, is an incorporated community with a 1990 Census population of 1,820 persons. This request conflicts with that portion of Sunrise's proposal which seeks the substitution of Channel 248A for Channel 286A at Sac City. However, the Mahns state that both proposals can be accommodated by allotting Channel 265A or Channel 284A in lieu of proposed Channel 248A to Sac City. They state that Channel 265A can be allotted to Sac City with a site restriction of 15 kilometers west-southwest if the proposed channel change at Storm Lake is adopted. Channel 284A can be allotted to Sac City with a site restriction of 14 kilometers northeast. According to the Mahns, both channels can provide Sac City with the required 70 dBu city-grade coverage.

7. Northwest opposes the Mahns' counterproposal. Northwest argues that the substitute channels for Sac City, Channels 265A and 284A, each require a site restriction so severe as to "virtually guarantee" that they will not be activated. It states that the Commission requires that there must be a reasonable expectation that a usable site is available before an allotment will be made, citing *Cave City, Kentucky*, 7 FCC Rcd 1363 (1992), which cites *San Clemente, California*, 3 FCC Rcd 6728 (1988). In this case, Northwest contends that Channel 284A has a usable transmitter site area of approximately one square kilometer minus the land area occupied by two intersecting roads. The land area available for Channel 265A is larger, according to Northwest, but is still small and distant from the county's largest community. In addition, the site restriction necessary to comply with the Commission's mileage separation requirements necessitates placement of the transmitter at the outer limits from which city grade service could be provided to Sac City. Northwest points out that the Mahns do not intend to apply for the Sac City allotment. Therefore, it argues that it cannot be presumed that the Mahns have made a determination that there are available feasible transmitter sites. In addition, Northwest contends that the allotment of either Channel 265A or Channel 284A to Sac City could also restrict the flexibility of neighboring stations to relocate their transmitters.

8. Northwest goes on to state that Buena Vista County, with a population of 19,965 persons, is already served by Station KAYL-FM at Storm Lake and Station KTFG(FM) at Sioux Rapids. Sac County, in which Sac City is located, has a population of 12,324 people but no FM stations. Therefore, it argues that it is inappropriate to allot a severely restricted channel just so that Buena Vista County can receive its third service. Northwest also states that the allotment of Channel 265A to Sac City is dependent upon Station KAYL-FM moving from Channel 268C1 to Channel 269C1. It contends that Station KAYL-FM does not have to change its operating channel unless and until Station KBWH(FM) at Blair is actually ready to go on the air on Channel 268C3. Should Station KBWH(FM) decide not to build, Northwest submits that Channel 268C1 would remain allocated to Storm Lake. Finally, Northwest contends that the counterproposal should not be considered since the Mahns failed to state an intention to apply for the substitute channel at Sac City[7] and to reimburse the expenses of the existing stations which must change channel to permit the Alta allotment, citing *Brookville, Pennsylvania*, 66 RR 2d 493 (1988).

9. Sunrise, in reply comments, supports the grant of all of the proposals before the Commission since alternate channels are available for use at Perry and Sac City which resolve the conflicts. It specifically supports the substitution of Channel 284A at Sac City so as to permit the allotment of Channel 248A to Alta. Sunrise argues that Northwest's concerns about the lack of usable transmitter sites are speculative and insufficient to overcome the Commission's policy of accommodating as many proposals for new and/or improved services as possible. It states that even though Northwest may oppose the Alta allotment for competitive reasons, the public interest is better served by accommodating the expressed intention to provide Alta with its first local service than by "fretting" over a channel change for an allotment which has never been activated.

10. Perry agrees to the substitution of Channel 288A for Channel 269A at Perry and the modification of Station KDLS-FM' license to specify the alternate Class A channel. However, because this channel change will be the second such change since July of 1991, Perry requests that, for a "reasonable period of time," no further requests seeking the move of Station KDLS-FM to accommodate another station's allotment be adopted.[8]

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[6] Section 1.420(g)(3) of the Commission's Rules allows the modification of a station's license to a higher class channel if the proposal involves a co-channel or adjacent channel that is mutually exclusive with the existing license. The Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which are necessary to create the mutually exclusive relationship required under Section 1.420(g)(3), and stated our intention to consider such "incompatible channel swaps" on an individual basis. *See Modification of FM Broadcast License to Higher Class Co-Channel or Adjacent Channels*, 60 R.R. 2d 114 (1986).

[7] Contrary to Northwest's argument, the Commission does not require an expression of interest in a channel allotment which is proposed as a substitute for an existing allotment when the substitution is necessary to accommodate a new allotment.

[8] By *Report and Order*, Station KDLS was previously ordered to move from Channel 285A to Channel 269A. *See* MM Docket 89-41, 5 FCC Rcd 1886 (1990). The Commission will not grant Perry's request that no further channel change be adopted for a "reasonable period of time." The Commission recognizes that changing a station's channel may be disruptive to both the station's operation and its listenership and thus will order such a change only where we find that the public interest benefits flowing from the change outweigh the benefit which comes from maintaining channel continuity. Here, the substitution of

11. *Discussion.* As an initial matter, we find that the objections raised by Northwest are not sufficiently compelling to warrant the denial of an allotment to Alta. Northwest states that the proposed replacement of Channel 248A at Sac City with either Channel 265A or Channel 284A requires severe site restrictions which make either allotment virtually unusable. A staff engineering analysis shows that Channel 265A cannot be allotted to Sac City because terrain obstructions would prevent the entire community from receiving a 70 dBu city-grade signal. However, the staff analysis also shows that Channel 284A can be allotted to Sac City with a site restriction of 14.9 kilometers (9.3 miles) northeast and provide the required signal coverage to all of the community. We do not disagree that we are replacing substitute Channel 248A at Sac City, an allotment which would require no site restriction, with one which does impose a site restriction and thus does limit the land area available as a transmitter site. However, Northwest's study is based on the reference coordinates proposed by the Mahns which would have required a site restriction of 15.7 kilometers (9.8 miles) northeast, and thus more restrictive than the reference coordinates analyzed by the staff. Further, although the land area available for a transmitter may not be as large as that available for presently allotted Channel 286A or originally proposed 248A, Northwest has not shown that there are no sites available which would comply with the mileage separation requirements and also provide Sac City with the required signal level. It is true that the Mahns may not have explored the availability of potential transmitter sites as thoroughly as they would have if they intended to apply for the allotment. However, the Commission, at the rule making stage, is concerned with whether a theoretical site exists that would comply with our engineering requirements unlike at the application stage where the concern is the availability or suitability of a given site. *See Wilmington, North Carolina, et al.*, 6 FCC Rcd 6969 (1991). In this case, the staff's engineering study shows that the channel can be allotted at the coordinates specified herein in compliance with the Commission's minimum mileage separation requirements and all other engineering requirements. Northwest also argues that allotting a channel to Sac City with a site restriction could restrict other nearby stations from relocating their transmitters in the direction of Sac City. However, Channel 284A can be allotted to Sac City without adversely affecting any application which is now pending before the Commission. Furthermore, no station which might be affected by the Sac City allotment has commented in the proceeding. Therefore, we find that Northwest's argument as to any harm which may be caused to nearby stations is without merit. Finally, we see no reason to deny a community of its first local service where an interest in activating a channel has been expressed in order to avoid a channel substitution for a vacant allotment in a community where no interest in the allotment has been expressed.

12. We also reject ABC's claim that its counterproposal constitutes an incompatible channel swap and is thus protected from competing expressions of interest. In adopting the rule which permits upgrades on co- and adjacent channels without allowing competing expressions of interest, the Commission stated that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create the mutually exclusive relationship required to comply with Section 1.420(g)(3) of the Commission's Rules. *See Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, supra.* As an example, the Commission contemplated a situation where a licensee on Channel 240A at community A seeks to upgrade on Channel 271C2. To do so, the licensee on Channel 240A must exchange channels with the licensee on Channel 270A in community B. The allotment of Channel 271C2 to community A must require the deletion of Channel 270A at community B and Channel 240A must be the only Class A which can be substituted at community B. Further, in order to qualify as an incompatible channel swap, the exchange of channels must be in situations where neither substitute channel is available for general application. Here, ABC does not propose to swap its current operating channel with another authorized facility but to make it available as a first local FM service at Lake City. In addition, Channel 296C3 is not the only Class C3 channel available for allotment to Lake City since the staff has found that Channel 294C3 can be allotted. Further, Channel 294C3 does not require channel substitutions at either Ames or Denison. Therefore, since a Class C3 channel is available for allotment to Lake City which does not require an existing station to change frequency, we will allot Channel 294C3 instead of Channel 296C3, as proposed by ABC. We will also modify ABC's license for Station KCCQ to specify operation on Channel 286C3. Competing expressions of interest were specifically solicited in the Public Notice announcing the filing of the counterproposal and no competing interest was expressed. *See, e.g., Sioux Center, Iowa, Sioux Falls, South Dakota*, 3 FCC Rcd 6153 (1988).

13. Accordingly, we believe the public interest would be served by substituting Channel 268C3 for Channel 292A at Blair since it could provide the community with its first wide coverage area service and enable Station KBWH(FM) to expand its coverage area, by allotting Channel 247C3 to Blair since an interest has been expressed in providing the community with its second local wide coverage area FM service, by allotting Channel 248A to Alta, as its first local FM service, by substituting Channel 268C3 for Channel 296A at Ames since it could enable Station KCCQ to expand its coverage area and by allotting Channel 294C3 to Lake City, as the community's first local FM service. The licensees of Stations KDLS-FM at Perry and KAYL at Storm Lake have agreed to the modification of their licenses to specify Channels 288A and 269C1, respectively, to accommodate the allotment of Channel 268C3 to Blair, and Sunrise has stated its intention to reimburse the affected licensees.[9] The substitution of Channel 284A for Channel 286A at Sac City does not require Station KAYL

Station KDLS' channel enables the allotment of a wide coverage area FM service to Blair and expansion of service by Station KBWH(FM).

[9] Northwest states that Station KAYL does not have to change channel unless and until Station KBWH(FM) is ready to go on the air. It goes on to state that should Station KBWH(FM) decide not to build the station on Channel 268C3, Channel 268C1, Station KAYL-FM's present channel, will remain allotted to Storm Lake and no change in frequency would be required. Northwest is incorrect. When a station is modified to another channel in rule making, the Report and Order adopting the action modifies Section 73.202(b) of the Commission's Rules by deleting the old channel and adding the new channel to the Table of Allotments. With this *Report and Order*, Channel

to change channel and thus Northwest is not entitled to reimbursement from the ultimate permittee of Channel 248A at Alta.

14. Channel 268C3 can be allotted to Blair in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.8 kilometers (11.1 miles) northwest to accommodate Sunrise's desired transmitter site. Channel 247C3 can be allotted to Blair with a site restriction of 22.6 kilometers (14.1 miles) northwest to avoid short-spacings to Station KZKX, Channel 245C1, Seward, Nebraska, KDMI, Channel 247C1, Des Moines, Iowa, KPAT, Channel 247C1, Sioux Falls, South Dakota, KLRB, Channel 247C2, Aurora, Nebraska. Channel 288A can be allotted to Perry at the site specified in Station KDLS-FM's outstanding application (File No. BPH-910812IH) which is 5.5 kilometers (3.4 miles) east. Channel 269C1 can be allotted to Storm Lake at the licensed site of Station KAYL. Channel 284A can be allotted to Sac City with a site restriction of 14.9 kilometers (9.3 miles) northeast to avoid short-spacings to Stations KESY-FM, Channel 283C, Omaha, Nebraska, KKLS-FM, Channel 284C, Sioux Falls, South Dakota, and KJJG, Channel 285A, Spencer, Iowa. Channel 248A can be allotted to Alta, Iowa, with a site restriction of 1.0 kilometers (0.6 miles) northeast. Channel 286C3 can be allotted to Ames with a site restriction of 4.4 kilometers (2.7 miles) north-northwest to accommodate ABC's preferred site. Channel 294C3 can be allotted to Lake City with a site restriction of 9 kilometers (5.6 kilometers) northwest to avoid a short-spacing to a pending application (File No. BPH-910314MI) for Channel 294C2 at Grinnell, Iowa.[10]

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Alta, Iowa	248A
Ames, Iowa	281C, 286C3
Lake City, Iowa	294C3
Perry, Iowa	288A
Sac City, Iowa	284A
Storm Lake, Iowa	269C1
Blair, Nebraska	247C3, 268C3

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sunrise Broadcasting of Nebraska, Inc., for Station KBWH(FM), Blair, Nebraska, IS MODIFIED to specify operation on Channel 268C3, in lieu of Channel 292A, and the license of Ames Broadcasting Company for Station KCCQ, Ames, Iowa, IS MODIFIED to specify operation on Channel 268C3 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Northwest Iowa Broadcasting Corp., for Station KAYL, Storm Lake, Iowa, IS MODIFIED to specify operation on Channel 269C1 in lieu of Channel 268C1, and the license of Perry Broadcasting Co. for Station KDLS-FM, Perry, Iowa, IS MODIFIED to specify operation on Channel 288A in lieu of Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KAYL's license, File No. BLH-920921KE, or in Station KDLS-FM's license, File No. BLH-5066, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-920921KE or File No. BLH-5066, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

268C1 is no longer allotted to Storm Lake and the Table of Allotments is modified to specify Channel 269C1 instead. Northwest is correct that Station KAYL-FM may not be required immediately to change to Channel 269C1. However, this is not because Station KAYL-FM retains any rights to the channel. Rather, Station KAYL-FM will be required to change channel at such time as the station's continued operation on its present channel prevents the activation of any other channel which meets the mileage separation requirements to Channel 269C1 but not Channel 268C1 at Storm Lake, regardless of the status of Station KBWH(FM). Furthermore, any permittee for Station KBWH would be required to operate on Channel 268 at Blair, not Channel 292.

[10] The coordinates for Channel 268C3 at Blair are North Latitude 41-38-52 and West Longitude 96-17-55. The coordinates for Channel 247C3 at Blair are 41-42-43; 96-17-20. The coordinates for Channel 288A at Perry are 41-50-03; 94-02-12. The coordinates for Channel 269C1 at Storm Lake are 42-38-05; 95-10-10. The coordinates for Channel 284A at Sac City are 42-30-37; 94-52-14. The coordinates for Channel 248A at Alta are 42-40-25; 95-17-25. The coordinates for Channel 286C3 at Ames are 42-04-05; 93-38-13. The coordinates for Channel 294C3 at Lake City are 42-19-08; 94-49-08.

18. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sunrise Broadcasting of Nebraska, Inc., licensee of Station KBWH(FM), and Ames Broadcasting Company, licensee of Station KCCQ, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

19. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: Northwest Iowa Broadcasting Corp., Station KAYL, 604-1/2 Lake Avenue, Storm Lake, Iowa 50588, and Perry Broadcasting Co., Station KDLS-FM, P.O. Box 548, Perry, Iowa 50220.

20. The window period for filing applications for Channel 248A at Alta, Iowa, Channel 247C3 at Blair, Iowa, and Channel 296C3 at Lake City, Iowa, will open on **August 3, 1993,** and close on **September 2, 1993**.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-294

In the Matter of

Amendment of Section 73.202(b),	RM-8129
Table of Allotments,	RM-8190
FM Broadcast Stations.	
(Seaside and Cannon Beach, Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 3, 1993; **Released: June 16, 1993**

By the Chief, Allocations Branch:

1. At the request of Ken's Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 8543 (1992), proposing the allotment of Channel 255A to Seaside, Oregon, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. A counterproposal was filed by Contour Communications ("Contour") requesting the allotment of Channel 255A to Cannon Beach, Oregon, as the community's first local FM service.[2]

2. Contour states that Cannon Beach should be preferred over Seaside since the community presently has no local FM transmission service. In response, petitioner states that Seaside should be the preferred community because it has a population of 5,359 persons while Cannon Beach has a population of only 1,221 persons.[3] However, it states that a comparison of the two communities is not necessary since alternate channels are available for allotment to Cannon Beach. Petitioner specifically suggests that either Channel 243A or Channel 264A be allotted to Cannon Beach, thus resolving the conflict.

3. We believe that both communities are deserving of the requested allotment but Channel 255A cannot be allotted to both since the communities are located less than the required minimum distance for co-channel Class A channels. However, we need not compare the two communities since our engineering analysis confirms that an alternate channel is available for allotment to Cannon Beach. Accordingly, we find that the public interest would be served by allotting Channel 255A to Seaside, as the community's second local service, and by allotting Channel 243A to Cannon Beach as its first local FM service. Channel 255A can be allotted to Seaside in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) south to avoid a short-spacing to Station KEZX-FM, Channel 255C, Seattle, Washington. Channel 243A can be allotted to Seaside without the imposition of a site restriction.[4] Canadian concurrence in both allotments has been received since Seaside and Cannon Beach are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cannon Beach, Oregon	243A
Seaside, Oregon	251A, 255A

5. The window period for filing applications for Channel 243A at Cannon Beach, Oregon, and Channel 255A at Seaside, Oregon, will open on **August 3, 1993,** and close on **September 2, 1993**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Cannon Beach has been added to the caption.
[2] Public Notice of the filing of the counterproposal was given on February 26, 1993, Report No. 1930.
[3] Census figures are taken from the 1990 U.S. Census.
[4] The coordinates for Channel 255A at Seaside are North Latitude 45-56-45 and West Longitude 123-56-07. The coordinates for Channel 243A at Cannon Beach are 45-53-42; 123-56-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-290

In the Matter of

Amendment of Section 73.202(b),	RM-8127
Table of Allotments,	RM-8189
FM Broadcast Stations.	
(Colfax and Fairbury, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 3, 1993; **Released: June 16, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 8541 (1992), issued in response to a petition for rule making filed by Livingston County Broadcasters, Inc. ("Livingston") requesting the allotment of Channel 299A to Colfax, Illinois, as that community's first local FM service. Livingston filed supporting comments. McLean County Broadcasters, Inc. ("MCBI") filed comments and a counterproposal requesting the allotment of Channel 299A to Fairbury, Illinois, as that community's first local aural transmission service.[2] DMR Media, Inc. ("DMR") filed reply comments in support of the allotment at Fairbury.

2. MCBI in its counterproposal notes that the allotment of Channel 299A at Colfax and Fairbury, Illinois, are mutually exclusive. MCBI states that Fairbury had a 1990 U.S. Census population of 3,643, which is over four times as large as the 1990 U.S. Census population of Colfax of 854 people. MCBI contends that Fairbury's population increased by 2.8% from 1980 to 1990, while Colfax's population declined by 7.2% from 1980 to 1990. MCBI argues that the Fairbury is more deserving of a first local aural transmission service than Colfax. MCBI states its intention to apply for Channel 299A, if allotted.

3. DMR filed reply comments stating that the allotment of Channel 299A to Fairbury would better serve the public, since it would provide first local aural service to a town of significance. DMR states that it will apply for the channel if allotted. DMR notes that Fairbury has a retail and business district, a Chamber of Commerce, and many clubs and service organizations such as the Rotary, Boys and Girls Club, Lions Club, Odd Fellows, and Masons. In addition, DMR states that Fairbury has at least twelve churches. DMR states that Fairbury has an aldermanic form of government with a Mayor and 8 aldermen. DMR also notes that Fairbury has a weekly newspaper. DMR contends that Fairbury is more deserving of the allotment because it is in Livingston County which has only one full-time station, while Colfax is in McLean County which has at least five full-time stations.

4. After consideration of the information filed in this proceeding, we find that both communities are deserving of an allotment. We note that after the record closed Livingston filed a "petition for resolution of rule making" suggesting the use of alternate Channel 225A at Fairbury. Although pursuant to Section 1.415(d) of the Commission's Rules we do not contemplate the filing of pleadings beyond the reply comment period, acceptance of this pleading would be warranted since it suggests a settlement which would not cause prejudice to any party in the proceeding. However, we need not consider this pleading, since our staff engineering analysis determined that Channel 225A is available for allotment as an alternate channel. Our analysis also determined that while Channel 225A or 299A could be allotted to Colfax, Channel 225A would not provide city grade coverage to Fairbury. Therefore, we believe that the public interest could be served by allotting Channel 225A to Colfax as its first local aural transmission service, and Channel 299A to Fairbury as its first FM service. In view of the availability of an alternate channel for use at Colfax, a comparative analysis of the communities is unnecessary. Channel 225A can be allotted to Colfax in compliance with the Commission's minimum distance separation requirements without a site restriction.[3] Channel 299A can be allotted to Fairbury in compliance with the Commission's minimum distance separation requirements without a site restriction.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Colfax, Illinois	225A
Fairbury, Illinois	299A

6. The window period for filing applications for Colfax and Fairbury, Illinois, will open on **August 3, 1993,** and close on **September 2, 1993**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

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[1] The community of Fairbury, Illinois, has been added to the caption.

[2] Public Notice of the counterproposal was given February 26, 1993, Report No. 1930, RM-8189.

[3] The coordinates for Channel 225A at Colfax are North Latitude 40-33-54 and West Longitude 88-36-54.

[4] The coordinates for Channel 299A at Fairbury are North Latitude 40-44-42 and West Longitude 88-30-42.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Northern States Power Company
St. Paul, Minnesota,
Ironwood, Michigan,
La Crosse, Wisconsin, Minot and
Grand Forks, North Dakota,
Sioux Falls, South Dakota
for a waiver of the Rules to allow
multiple address systems
with multiple master stations
operating at separate locations
on narrow bandwidth sub-channels

File Nos. 776682 through 776687

WAIVER

Adopted: May 27, 1993; Released: June 16, 1993

By the Chief, Private Radio Bureau:

1. Northern States Power Company (Northern) seeks a waiver of Sections 94.3, 94.15, and 94.65 of the Commission's Rules, 47 C.F.R. §§ 94.3, 94.15(d), and 94.65(a)(1), to permit six multiple address systems (MAS) each with multiple master stations operating at separate locations on narrow bandwidth sub-channels offset from assignable MAS frequencies in the Private Operational-Fixed Microwave Service (OFS). Section 94.3 defines an MAS system as a single master station with at least four corresponding remote stations. Section 94.15(d) requires MAS stations be assigned frequencies listed in Section 94.65(a)(1).

2. Northern has filed the captioned applications in the OFS, requesting authority to operate the MAS systems each with multiple master stations at locations displaced up to 20 miles from the center of each system. These masters would operate on ten 1.2 kHz sub-channels, centered on and offset from the assignable frequencies on 2.083 kHz intervals, each modulated to accommodate a digital capacity of 2.4 KBPS. The masters would operate with an effective isotropic radiated power (EIRP) limited to 46 dBm, reduced 7 dB from that normally permitted (53 dBm), and a frequency tolerance of 0.0001%, closer than that normally permitted (0.00015%). The antenna heights of the multiple masters would be reduced to those needed to reach service areas within 35 miles of the center of each system. The minimum aggregate digital capacity of each system with 10 masters in use would be 24 KBPS. Northern could exercise frequency reuse such that each system would comprise up to 50 masters with an aggregate digital capacity of 120 KBPS.

3. Northern plans to accommodate several thousand remotes with each proposed system. Each system would provide supervisory control and data acquisition in support of Northern's operations. Northern certifies that it will operate a master and at least four corresponding remotes on each sub-channel within the first year of operation.

4. In support of its request, Northern states that its use of multiple dispersed masters on sub-channels results in an extremely efficient use of MAS spectrum, providing at least 5 times more capacity than older 4.8 KBPS systems found on 25 kHz channels. Moreover, its use of reduced EIRP and lower master antenna heights would present less potential for interference to neighboring systems. Finally, Northern certifies, based upon frequency engineering analysis, that each of its proposed MAS systems will not cause harmful interference to any existing or applied-for systems, since each of its proposed systems is not co-channel with any other MAS systems whose master station is within 90 miles of Northern's center of operation.

5. In this case, Northern has demonstrated that its systems would use MAS spectrum more efficiently than systems normally accommodated on a 25 kHz channel. We note that the capacity of modern MAS systems varies from 9.6 to 19.2 KBPS, higher than the 4.8 KBPS capacity cited by Northern for older systems. But Northern's proposed digital capacity, varying from 24 KBPS to 120 KBPS, still represents a significant increase in efficiency in the use of MAS spectrum. We agree that its use of lower EIRP, tighter tolerance, and lower master antenna heights, and the restriction of its masters to locations within 20 miles and its remotes to locations within 35 miles of the center of each system, should present an interference potential lower than that of a normal system.

6. Northern proposes unique systems that cannot be properly accommodated in the Rules. The proposed systems are the only alternative available that would allow Northern to provide a high digital capacity without undermining the purpose of the Rules waived, which is to promote the efficient use of MAS spectrum. We find that the proposed operations would further the purpose of the Rules waived and that it would be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

7. Pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, Northern States Power Company's request for waiver of Sections 94.3, 94.15(d), and 94.65(a)(1) of the Commission's Rules, 47 C.F.R. §§ 94.3, 94.15(d), and 94.65(a)(1), for the referenced applications IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Checkpoint Systems, Inc. NAL/Acct. No.: 315HF0002
Thorofare, New Jersey

ORDER

Adopted: June 7, 1993; Released: June 16, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Checkpoint Systems, Inc., (Checkpoint) for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's rules, 47 C.F.R. §2.803. On March 26, 1992, and June 16, 1992, Checkpoint Systems, Inc., marketed anti-theft systems which where not authorized by the Commission as required.

2. The appropriate amount of forfeiture for these violations is $14,000.

II. BACKGROUND

3. Checkpoint is a manufacturer and installer of anti-theft devices which use field disturbance sensors. These consist of a tuned circuit target, which is placed in a book-binding, and a detector. The detector transmits a signal which sweeps through a range of frequencies, including the one to which the target is tuned, and its receiver detects the effect of the presence of the tuned circuit in the radio frequency (rf) field. An alert sounds when a book which has not been checked out passes through the device. These systems are rf devices within the meaning of Part 15 of the rules and must be certified. See 47 C.F.R. 2.201(b).

4. Checkpoint sold and installed a Quicksilver model field disturbance sensor, FCC ID: D0463D2G, at the Atlanta Area Technical School in Atlanta, Georgia, invoice date June 16, 1992. It also sold and installed three Signature Series field disturbance sensors, FCC ID: D0463DM3 at the Athens/Clark County Library, invoice date March 26, 1992.

5. On December 8, 1992, the Commission issued a Notice of Apparent Liability for Monetary Forfeiture to Checkpoint which asserted that none of these devices are authorized to operate on frequencies above 10 MHz and that all but one of the devices at the Athens/Clark County Library operate on frequencies significantly above 10 MHz.

6. Checkpoint replied on January 7, 1993, asserting that the violations were not willful and, therefore, no forfeiture should be imposed. In support, it alleges that the device at the Atlanta Area Technical School did not operate on frequencies significantly above 10 MHz, that Checkpoint's employees were instructed to ensure that the devices did not sweep on frequencies above 10 MHz and that these employees were reliable in following instructions, and that the frequencies measured by the Commission were arguably below 10 MHz when the precision of the Commission's measurements is considered.

7. Checkpoint further replied that the devices installed at the Athens/Clark County Library were covered by a Special Temporary Authority (STA) granted by the Commission. The STA, dated April 2, 1992, was requested by Checkpoint and "applies to the systems bearing FCC identifiers D0463D2G and D0463DM3 that operate above 10 MHz. This equipment was certificated by the Commission for operation below 10 MHz. However, versions of these systems have been marketed that operate above 10 MHz and have not been authorized." In Checkpoint's request it states that it has taken steps to cease marketing these devices and that its actions relates primarily to libraries. It also mentions, "We also discussed our video store customer base and our '9.5' systems." Checkpoint assured the Commission that it was devising a plan to retrofit existing devices and to otherwise bring its devices into compliance with the rules. Due to the time and expense involved, the Commission agreed that some library systems would be allowed to continue using the equipment sold in violation and that new branches of those systems could be equipped with the uncertified devices so as not to compromise library security until the devices could be retrofitted.

8. As part of the negotiations on the STA, Checkpoint had advised the Commission on March 3, 1992, of the number of systems to be covered by the STA; they did — 28 altogether. The STA was limited by its terms to these 28 systems. As admitted by Checkpoint, the Athens/Clark County Library System was not on that list. Checkpoint explains this as a matter of timing and urgency and not a willful act. Checkpoint states that the devices at issue here were ordered "on a rush basis," on March 11, shipped on March 20, and installed on April 21, 1992. On July 20, 1992, the Commission requested a list of the systems to be covered by the STA. Checkpoint responded on August 24, 1992. Checkpoint states that it cannot explain why this system was not on the list and its failure to ask for modification of the STA to include it.

9. On February 4, 1993, the Commission reinspected the equipment at the Atlanta Area Technical School. It found that the equipment had been rearranged and that it no longer radiated on frequencies above 10 MHz. Checkpoint employees had visited in December[1] and made adjustments. That the visit by Commission personnel was unwelcome was made clear by the library staff. This was apparently due to the fact that the adjustments by Checkpoint had required the library staff to change targets in books over the Christmas vacation.

[1] Checkpoint's reply to the NAL gives the date as December 16, 1992.

III. DISCUSSION

10. The crux of Checkpoint's argument is that, whatever violations may have occurred, they were not willful and, therefore, a forfeiture cannot be assessed. The marketing of the uncertified devices are the acts upon which the forfeiture assessment is based and there is no question that the sales and installations were willful. Checkpoint offers no other mitigating circumstances.

11. The Quicksilver System at the Atlanta Area Technical School was found operating on frequencies above those authorized. This cannot be explained away by Checkpoints assertion that it instructed its employees to make sure that such devices did not sweep on frequencies above 10 MHz. It is responsible for its employees' actions. Nor do we accept that use of frequencies above 10 MHz is not significant.[2] When the system was retuned and no longer swept through frequencies above 10 MHz, it was necessary to replace targets in a significant number of the library's books. That these devices were known to operate above 10 MHz is evidenced by the necessity for including them in the request for the STA with the inference that 10 MHz devices had been installed in libraries and the 9.5 MHz devices in video stores.

12. The STA, by its terms, is "limited to the 28 new library systems that have pending orders." The system at the Athens/Clark County Library was not one of the 28 systems by Checkpoint's own admission. Given the explicit language of the STA, Checkpoint's assertion that it believed that additional systems would be covered by the STA is insufficient to exonerate it from liability. Checkpoint was admittedly in violation of the Commissions rules by installing the devices covered by the STA and asked for special dispensation to avoid a costly retrofit. It should have asked for a modification of the STA. Instead, it continued a pattern of activity which had brought it to this juncture.

13. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *modified in part on recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, the base forfeiture amount for marketing of unauthorized equipment is $7,000 for each violation. No adjustments appear warranted. Because there were two violations here, it is consistent with the *Policy Statement* that the forfeiture amount be $7,000 for each violation, or a total of $14,000.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Checkpoint Systems, Inc., IS LIABLE FOR A MONETARY FORFEITURE in the amount of $14,000 for marketing unauthorized field disturbance devices twice in violation of Section 302 of the Communications Act and Section 2.803 of the Commission's rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

15. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Checkpoint Systems, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No.: 315HF0002" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

16. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent by Certified Mail to Checkpoint Systems, Inc., 550 Grove Road, Thorofare, New Jersey 08086.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

[2] Checkpoint asserts that the system operated only .3 MHz above the frequency range authorized and that this is not significant within the precision of the Commission measurement. Actually, the measurement was made to four decimal places and rounded to two, or 10.30 MHz, a precision of much better than .1 MHz as assumed by Checkpoint.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Xi Computer Corporation NAL/Acct. No.215LA0064
San Clemente, California

ORDER

Adopted: June 8, 1993; Released: June 16, 1993

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a letter requesting reconsideration of a Forfeiture Order issued on October 8, 1992, and a corrected Forfeiture Order issued on October 22, 1992, to Xi Computer Corp., San Clemente, California (Xi Computer), for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. For the reasons set forth below, we are granting Xi Computer's request for reconsideration and are cancelling the Forfeiture Order issued to Xi Computer Corporation on October 8, 1992, and the corrected Forfeiture Order issued to it on October 22, 1992.

II. BACKGROUND

3. The Commission's Los Angeles (LA) office issued Forfeiture Orders to Xi Computer Corporation after an FCC inspector visited Xi Computer Corporation's place of business at 980 Calle Negocio, San Clemente, CA 92672, on September 17, 1992. During this visit, one of Xi Computer's representatives offered to sell an Xi "Model Workstationer 333" 33 MHz personal computer to the inspector. A subsequent search of Commission records indicated that no FCC authorization had ever been issued for this model computer. On September 21, 1992, the LA office issued a $7,000 Notice of Apparent Liability (NAL) to Xi for marketing the uncertified "Model Workstationer 333" personal computer in violation of Section 15.101 of the Commission's Rules, 47 C.F.R. §15.101.

4. By letter dated September 25, 1992, Xi Computer responded to the NAL, clarifying that the device offered was indeed certified (under FCC ID No. JPWXI38633WKST) but may have been identified in the offer for sale by its "system designation" of "Model Workstationer 333." By Forfeiture Order, issued October 8, 1992, the LA office appeared to have accepted Xi's response that the disputed equipment was indeed certified by the Commission. The LA office then listed two other computer models (the Xi425W and Xi 386SX) which, according to FCC records, also lacked FCC certification and issued a Forfeiture Order for the marketing of these computer models in violation of Section 15.101 of the Rules.

5. The Forfeiture Order, dated October 8, 1992, was followed soon thereafter by an October 22, 1992 "Corrected Forfeiture Order." The corrected Order listed several more computer models and computer peripherals advertised by Xi in its sales literature which the LA office found to be non-compliant (from the Xi 386 Notebook Family and the Xi 486/386 Netserver Family, including models Xi320SXNBH40 Notebook (20 MHz), Xi433CN Netserver (33 MHz), Xi425N Netserver (25 MHz), and the Xi333CN Netserver (33 MHz)). By letter dated October 28, 1992, Xi requests reconsideration and rescission of these Orders.

III. DISCUSSION AND CONCLUSION

6. Xi's request for reconsideration and rescission of the forfeiture was made through its representative, Pacific Design Engineering Laboratories, Inc., the facility used by Xi to perform FCC compliance testing. Xi argues that it was not given notice regarding the other equipment cited in the Forfeiture Orders, nor was it given an opportunity to submit information regarding the authorization for these devices.

7. We agree. Xi was not provided with notice regarding its apparent liability for marketing the other allegedly unauthorized equipment. Section 503(b)(4) of the Communications Act prohibits the imposition of a forfeiture penalty against any person unless, prior thereto, that person is issued a notice of apparent liability in writing specifically citing the act(s) or omission(s) which form the factual and legal basis or bases for the violation(s) charged. *See* 47 U.S.C. §503(b)(4). Under this provision, therefore, no forfeiture could be imposed against Xi, unless prior thereto Xi had been issued a notice citing the specific act which is alleged to be violative.

IV. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 1.106(k)(1)(i), 47 C.F.R. § 1.106(k)(1)(i), that the October 8, and October 22, 1992, Forfeiture Orders issued to Xi Computer Corp. are hereby cancelled.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested, to Xi Computer Corp. and to its representative, Pacific Design Engineering Laboratories, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-17

In re Applications of

ANNETTE B. GODWIN	File No. BPH-891129MF
FERNANDINA BEACH FM LIMITED PARTNERSHIP	File No. BPH-891129MH
MARTIN A. SECREST	File No. BPH-891130MH
FIRST COAST BROADCASTING, INC.	File No. BPH-891130ML
EMILY METCALF	File No. BPH-891130MO
MARDIROSSIAN BROADCASTING, INC.	File No. BPH-891130MP
BROOMECO BROADCASTING, INC.	File No. BPH-891130MR

For Construction Permit for a
New FM Station on Channel 287A
in Fernandina Beach, Florida

APPEARANCES

John F. Garziglia and *Louise Cybulski*, on behalf of Annette B. Godwin; *Lewis I. Cohen* and *John J. Schauble*, on behalf of Fernandina Beach FM Limited Partnership; *Howard M. Liberman* and *Gerald Stevens-Kittner*, on behalf of Martin A. Secrest; *Allan W. Marshall, III, pro se*, on behalf of First Coast Broadcasting, Inc.; *Lawrence J. Bernard, Jr.*, on behalf of Emily Metcalf; and *Robert A. Zauner*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: June 7, 1993; Released: June 17, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it the *Initial Decision* of Administrative Law Judge Joseph P. Gonzalez (ALJ), 7 FCC Rcd 7902 (1992)(*I.D.)*, in the above-captioned comparative licensing proceeding. It also has before it: (1) the (Godwin); (2) the Exceptions and Brief of Fernandina Beach FM Limited Partnership (Fernandina); (3) the Exceptions[1] of First Coast Broadcasting (First Coast); (4) the Exceptions And Supporting Brief of Martin Secrest (Secrest); and (5) Emily Metcalf's Consolidated Brief And Exceptions (Metcalf).[2] Reply pleadings have been filed by Godwin, Fernandina, Secrest and Metcalf, as well as a "Limited" Reply filed by the Commission's Mass Media Bureau.

INITIAL DECISION

2. Thirteen applicants originally filed for this northern Florida FM frequency; we are now down to five remaining contenders. The *I.D.*, at para. 97, awarded the Construction Permit to Godwin, finding her superior to runner-up Metcalf on local residence (with a slight additional credit for broadcast experience). *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, *et seq.* (1965). Secrest, though too awarded a 100% ownership management "integration" credit, was found inferior to those two aforesaid applicants, as he has never resided in the community of license. *See I.D.*, paras. 41-42. First Coast was likewise considered inferior under this criterion. *Id.*, paras. 49, 51.[3] And, finally, the ALJ awarded no "integration" credit to Fernandina, finding its purported limited partnership to be what had been formerly termed a "sham"[4] and that its putative general partner, Troy Lynn Payne (15% equity), was naught but window dressing for Robert Lee Dunham (85% equity). *I.D.*, paras. 26-37.

EXCEPTIONS

3. GODWIN. Fernandina, citing *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 417-19 (Rev. Bd. 1984),[5] asks the Board to reject Godwin's "integration" credit as "inherently incredible" because she indicated she may not initially have a salary at her solely-owned station, but would take a commission on her sales activities.[6] We reject this novel complaint, and find wholly inapposite *Washington's Christian*, wherein as Fernandina itself points out: "One principal was an optometrist who proposed to

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[1] Allen W. Marshall, III, appearing before the Board *pro se* as First Coast's president, styled his pleading "Petition For Reconsideration," but timely directed his pleading to the Board. His pleading will be treated as exceptions under 47 CFR § 1.277.

[2] Two other captioned applicants, Mardirossian Broadcasting, Inc. and Broomeco Broadcasting, Inc., did not prevail below, but our records reflect that neither filed exceptions. The applications of both will be dismissed pursuant to 47 CFR § 1.276(f) for failure to prosecute.

[3] *See also infra* paras. 18-19.

[4] In *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700 (1992), the Commission found that use of the term "sham," as utilized, *e.g.*, by the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3025 n.48 (1990), and the District of Columbia Circuit in *Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507, 511 (D.C. Cir. 1992), was "confusing," and monished against its use. *But cf. R.J. Winter, Inc.*, 7 FCC Rcd 2235, 2236 (1992)(Comm'n later reinvokes term "sham").

[5] *Modified on other grounds*, 59 RR 2d 787 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd per judgment*, No. 85-1649 (D.C. Cir. Dec. 17, 1987).

[6] Fernandina Exceptions at 15.

reduce his practice from full time to fifteen hours a week without any loss in income. The other principal was a bank employee who claimed that she would reduce her commitment to the bank from full time to half time without any cut in salary."[7] No such outlandish claims were made by Godwin. Fernandina also contends that Godwin's "proposal to operate her station twenty-four hours a day with only five other employees is unreasonable on its face."[8] The Commission's threshold for a staffing issue is rather stiff, *compare, e.g., Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 707-08 (Rev. Bd. 1975)(no staffing issue added where applicant proposed 5 full time employees) *with Pepper Schultz*, 103 FCC 2d 1052, 1055 (Rev. Bd. 1986)(disqualified applicant proposes to operate 24 hrs. per day with *zero* employees)(subsequent history omitted). Fernandina has not met the Commission's threshold for a staffing issue for this tyro Class A FM facility. *See United Broadcasting Co.*, 93 FCC 2d 482, 511-15 (1983).

4. Several of the exceptors decry the ALJ's refusal to add a financial issue against Godwin, claiming that her certification of "reasonable assurance" of financing from First Union Bank, St. Augustine, was improper because Godwin, it is urged, failed to provide the bank the full documentation necessary to support that bank's $300,000 written loan commitment.[9] It is asserted in Metcalf's exceptions that the bank's letter was based upon a single phone call to a banker unknown to Godwin,[10] and that the bank's "swiss cheese" letter was purely an "accommodation" by the bank's vice-president, James Swanson.[11] It is also contended that a second letter from the bank, issued six months after formal Commission designation of this hearing (to wit, July 19, 1991), seeking from Godwin additional collateral and a new appraisal of the market value of any new Fernandina Beach FM station raises further questions about the financing that neither Godwin, the Bank nor the ALJ have answered adequately.[12]

5. Invoking *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990),[13] Fernandina joins the denunciation of the ALJ for failing to add a financial issue against Godwin, contending that "there is a serious question as to whether First Union Bank ... reviewed her individual qualifications..."; that "the only documents she provided to the bank were a joint financial statement of she and her husband"; and that "[n]o business plan or written budget was provided to the bank.[14] Like Metcalf, Fernandina maintains that the bank's revised collateral requirements are fatally uncertain and that the "$170,000 in certificates of deposit" referenced by the bank in its second letter are owned jointly by Godwin and her aunt, a fact not announced on Godwin's financial statement.[15]

6. Godwin defends the ALJ's refusal to designate a financial issue by maintaining that Godwin utilized Swanson at First Union because "Mr. Swanson had done many radio loans and seemed quite knowledgeable about the business," and that[16]:

> First Union's November 7, 1989 letter conveys the bank's present firm intention to loan Ms. Godwin $300,000, pursuant to all of the terms set forth in the letter, if she is granted the construction permit. *See* First Union letter of November 7, 1989 (attached to First Coast's October 7, 1991 Motion to Enlarge Issues as Exhibit No.2). *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980)("[a] present firm intention to make a loan, future conditions permitting, is the essence of our reasonable assurance' standard."). In a Declaration dated October 25, 1991, Ms. Godwin details the steps she took in approaching First Union and securing the November 7, 1989 letter, upon which she relied for her affirmative financial certification. *See* Declaration of Ms. Godwin (attached to her October 29, 1991 Opposition to Motion to Enlarge as Attachment 3).

Godwin avers to have sent Swanson her financial statement and requested a commitment for a $300,000 loan "at the lowest interest rate for the longest period of time,[17] whereupon return "First Union's November 7, 1989 letter conveys the bank's present firm intention to loan Ms. Godwin

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[7] *Id.*

[8] *Id.*, at 15-16.

[9] *See id.* at 16-19; First Coast "Exceptions" at 3-4; Metcalf Exceptions at 3-8.

[10] *See* Metcalf Exceptions at 7.

[11] *See id.)*

[12] *See id.* at 8, where Metcalf reports that the bank's second letter to Godwin, in pertinent part, stated:

> Based on the changes that have occurred in the valuation of Radio Stations since my letter of 11-07-89 and the changes in Banking and your needs, the structure and terms of your request would need to be modified. . . . As additional collateral the pledge of your $170,000 in CD's to help in performance and additional collateral would be required along with an appraisal of the stick value of the new station to be 50% loan to value or better.

Metcalf also represents that Godwin has never attempted to obtain the said appraisal (*see id.*, at 9).

[13] *Review denied*, 6 FCC Rcd 1893(1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991), *aff'd sub nom . Mid-Ohio Radio, Ltd. v. FCC*, No. 91-1418 (D.C. Cir. March 26, 1993).

[14] Fernandina Exceptions at 17.

[15] *See id.*, at 17-19.

[16] Godwin Reply at 3.

[17] *Id.*, at 5, where it is further asserted:

> Ms. Godwin and Ms. [sic] Swanson had a detailed discussion of the following matters: (1) that Mr. Swanson would need to review her financial statement, (2) Ms. Godwin's financial position, (3) the approximate costs and expenses for the project, (4) Mr. Swanson's willingness to make the loan, (5) the possible interest rate, (6) loan expenses, (7) the term of the loan, and (8) the power output of the proposed station. Decl. at ¶ 8, and Statement by Mr. Swanson (at ¶ 3), dated October 28, 1991 (attached to Ms. Godwin's October 29, 1991 Opposition as Attachment 2). Mr. Swanson expressed to Ms. Godwin during this conversation that, as long as everything was okay with her financial statement, it would be a good deal for First Union. Decl. at ¶ 9, and Depo. Tr. 105. *See also* Swanson Statement at ¶ 3.

$300,000, pursuant to all of the terms set forth in the letter, if she is granted the construction permit.[18] She continues that[19]:

> Ms. Godwin was perfectly justified and reasonable in relying on First Union's November 7, 1989 letter as providing her with the assurance she needed. The letter states on its face, at ¶ ¶ 2 and 4, all of the terms necessary to establish reasonable assurance, including the conditions under which the loan would be extended, the amount of interest rate of the loan, the repayment period, and the collateral. *See Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973)(reasonable assurance exists where applicant's creditworthiness is reviewed and terms and conditions are negotiated to the satisfaction of the parties).
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> * * *
>
> Mr. Swanson wrote at ¶ 3 of the November 7, 1989 letter that '[w]e have examined your financial condition and at the time you are granted a construction permit, we are prepared to make available funds in the above amount [$300,000] as a loan to you.' Moreover, his Statement of October 28, 1991 confirms what his intentions were in issuing the November 7, 1989 letter. Mr. Swanson stated at ¶ 4 of his Statement that '[s]ince November 7, 1989, and continuing through to the present, First Union has given its assurance of financing to Ms. Godwin in the amount of $300,000.'

As to the bank's second letter (of July 1991), Godwin asserts[20]:

> Out of an abundance of caution and prior to the depositions in this case, Ms. Godwin contacted Mr. Swanson to confirm that everything was fine' concerning the arrangement detailed in the November 7, 1989 letter. Decl. at ¶ 11, and Depo. Tr. 110-111. Mr. Swanson indicated that everything was fine, but that the bank wanted to revise the terms of the earlier letter to improve its collateral position. Decl. at ¶ 11. First Union's desire to change certain terms of Ms. Godwin's loan had no impact *vis a vis* this assurance. Swanson Statement at ¶ 4. Ms. Godwin sent Mr. Swanson an updated financial statement, and he issued the letter dated July 19, 1991. Decl. at ¶ 11. Ms. Godwin and Mr. Swanson subsequently discussed the new letter, and Ms. Godwin agreed with the revised terms.

Godwin disputes Fernandina's charge that the collateral terms of the second letter are "fatally uncertain," asserting that "[t]o the contrary, Mr. Swanson has stated that "the pledge of [the] CDs *is* the additional collateral' referred to in the letter," *i.e.*, beyond the collateral referenced in the bank's initial letter.[21] Finally, Godwin declared under oath that her aunt (with whom $132,000 worth of the CDs are held in joint name) were gifted to her[22] and that the appraisal requested in the bank's second letter was not expected until the FCC Permit was granted and the loan formally consummated, because market conditions might very well change (as the Commission recognized in *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980)).

7. *Discussion.* In *Fox Television Stations, Inc.*, 8 FCC Rcd 2361, 2429-43 (Rev. Bd.), *recon. denied*, FCC 93R-21, released May 19, 1993, this Board conducted an extended recapitulation of the case law concerning the Commission's financial qualification standards. Because of the particular facts of that case, concentrated attention was there given to the question of whether a certain bank letter was a *bona fide* present commitment to provide a $10 million loan to the subject applicant or whether the "letter" relied upon was a mere "accommodation" to a customer (or prospective customer) having no substance or "present firm intention to make a loan, future conditions permitting"[23] undergirding it. We there compared a skein of cases where, by substantial evidence, the bank letters relied upon were shown to have all the earmarks of a hollow "accommodation"[24] with *other* licensing cases where the applicant had met the *Merrimack Valley* standard (*see supra* note 23). Or, as the Commission recently repeated in *Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7584 (1992)(footnote omitted), where it found that the subject applicant there had not relied upon a mere "accommodation letter":[25]

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[18] *Id.*, at 3.
[19] *Id.*, at 6.
[20] *Id.*, at 7.
[21] *Id.*, at 8 (original emphasis).
[22] *Id.*, at 9 (citing Declaration at para. 13). Godwin further submits (*id.*):

> Another $40,000 in CDs is held jointly between Ms. Godwin and her mother, Eloise C. Bowers, with whom Ms. Godwin has a similar understanding concerning the use of the CDs. *Id.* Attached to Ms. Godwin's October 29, 1991 Opposition are the Declarations of Ms. Corley and Ms. Bowers (at Attachments 5 and 6, respectively) confirming that they have always had the understanding that Ms. Godwin may use the CDs as she pleases. Moreover, Ms. Corley and Ms. Bowers each gave Ms. Godwin specific authority to pledge the CDs as collateral for a loan. *See* Attachments 4 and 5 of Ms. Godwin's October 29, 1991 Opposition.

[23] *See Fox*, 8 FCC Rcd at 2431 (quoting *Merrimack Valley*, *supra*, 82 FCC 2d at 167).
[24] *See Fox*, 8 FCC Rcd at 2431-36 (and cases cited therein). *Compare also Global Information Technologies, Inc.*, FCC 93R-26, adopted June 2, 1993 at paras. 4-15 (bank merely expresses interest "in exploring ways we could assist you in meeting your financial needs").
[25] The Commission's formulation in *Liberty Productions* is a condensation of its earlier-ratified *Scioto Broadcasters*, *supra*, 5 FCC Rcd at 5160, where the Board had written that it would review a questionable record to determine:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see*

> Our concern is whether a bank letter affords reasonable assurance of committed funding to construct the proposed facility and operate for three months without station revenues. To determine reasonable assurance of a bank loan, we generally consider the following factors: whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower.

See also, e.g., Harrison County Broadcasting Co., 6 FCC Rcd 5819, 5821 -22 (Rev. Bd. 1991)(bank letter considered to be reliable).

8. After reviewing the record materials animating the ALJ's *Order*, FCC 91M-3329, released November 26, 1991, where he declined to lodge a financial issue against Godwin, and studying the pleadings before us, we are unpersuaded that the ALJ erred in this respect. From all that is before us, it is clear that this case in no way resembles, for instance, *Fox* (or the other "accommodation letter" cases cited therein). In contrast to *Fox*, where the identified bank repeatedly shriveled from even a particle of a commitment to any future broadcast loan, or prior cases cited therein where the respective bankers were equally negative, Godwin here supplied First Union with the ordinary loan request documentation and data; specific terms were exchanged; and the bank's vice-president later expressly reaffirmed its positive intent when the bank letter was questioned. In that respect, our situation very closely resembles *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594 (D.C. Cir. 1978), where the court reversed this agency and found no lack of "reasonable assurance" from the bank to the reprieved applicant. *See also supra Liberty Productions; Harrison County; Scioto Broadcasters.*

9. There is, however, one aspect that gives us pause, for we recall the court's remonstration in *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1138-43 (D.C. Cir. 1985), where Judge Edwards berated the agency for permitting an applicant to rely upon certain real estate for financial security, the legal title to which land was actually in the name of his sister, notwithstanding the *WHW* applicant's claims of "equitable" title to the land and his solemn avowal that his sister had acquiesced in its use for the FCC application. *See generally also Joseph Bahr*, 7 FCC Rcd 2147, 2149-51 (Rev. Bd. 1992)(case remanded on candor issue where applicant claims of real property ownership contradicted by probative evidence). While citing neither *WHW* nor *Bahr* (nor any case for that matter), Fernandina, as we have indicated above, argues that the financial statement provided by Godwin to the bank does not disclose on its face any joint ownership of the $170,000 worth of CDs.[26]

10. Not without some risk of error, we nevertheless consider that the circumstances before us are significantly different than those presented in *WHW* and in *Bahr*. Unlike *WHW*, Godwin -- applying under the Commission's "box-checking" certification process -- did not proffer the CDs to *the FCC* as evidence of financial security, but to *the bank*, and it is nowhere alleged that *the bank* was unaware of the joint ownership. As we held in *Harrison County, supra*, where a banker issues a commitment letter, and thereafter expressly reaffirms its positive intentions, we will not second-guess a banker's judgment, and *no* Commissi on case goes so far in explicating the parameters of "reasonable assurance." Indeed, *compare Multi-State* and *Las Vegas Valley Broadcasting*, where the Commission was reversed for, perhaps, just exactly such "second-guessing." Nor is *Bahr* on point: there we merely remanded to take evidence as to the validity of an applicant's affirmative claims of legal title to certain real estate, despite the appearance of official local property records to the contrary.[27] Here, in immediate reaction to the request to the ALJ to add a financial issue, Godwin provided all of the information about the CDs, their ownership, and the declarations of the other joint owners fervently corroborating Godwin's own representations.[28] Under all of the circumstances present here, we are unconvinced on the record before us that the ALJ erred in rejecting First Coast's request for a financial issue.[29] These exceptions are denied.[30]

Multi-State Communications, Inc. v. FCC, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2062, 2072 (1979) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker*, [5 FCC Rcd 2855 (Rev. Bd. 1990), *vacated* 6 FCC Rcd 2557 (1991)]; *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

While the exceptors make much of the fact that Godwin had no prior relation with First Union Bank, Godwin has never suggested reliance upon *Multi-State*, in principle or by precedential analogy.

[26] *See* Fernandina Exceptions at 18-19.

[27] *See* 7 FCC Rcd at 2149-51.

[28] It is, we think, important to bear in mind that *until* First Coast sought a financial issue in mid-1991, neither Godwin nor any other applicant was required to demonstrate or explain the details of their finances to the FCC, since all were operating under the (now defunct) "certification" process. *See generally Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989), *aff'd per judgment sub nom. New Life Evangelistic Center v. FCC*, 859 F.2d 809 (D.C. Cir. 1990).

[29] We also note that, albeit appearing *pro se* by its principal, First Coast itself makes no further complaint about the joint ownership of the CDs. But Fernandina was not estopped from

11. One last matter must be attended before we terminate our survey of the treatment of Godwin. While appreciating the ALJ's "frustration with the lateness of [Secrest's] effort" to reopen the record (possibly two years) distant to explore a seeming discrepancy in Godwin's FM application certification date (November 26, 1989) and a letter of November 28, 1989 from her consulting engineer, Secrest's exceptions nonetheless challenge the ALJ's *Order*, FCC 92M-745, released July 2, 1992, denying First Coast's Motion To Enlarge on, *inter alia*, character grounds. That motion was filed on December 23, 1991.[31] Secrest also recognizes (1) that any motion to enlarge should have been filed by First Coast within 15 days after learning of the matter and seeking to question it, *see* 47 CFR § 1.229; and (2) that in *Broadcast Associates of Colorado, Inc.*, 104 FCC 2d 16 (1986), the Commission reversed the Board's *de facto* disqualification on candor grounds of an applicant who,[32] as Godwin is here alleged to have done, signed her FCC application form prior to receipt of her final engineering report.

12. Notwithstanding the foregoing, and even recognizing the exceedingly high hurdle set by the Commission for late motions to enlarge set forth in *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 (1991) (as recently fortified in *Liberty Productions, supra*, 7 FCC Rcd at 7581-85; *see also Evergreen Broadcasting Co.*, 7 FCC Rcd 6601 (1992))[33] Secrest urges that *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949), compels the Board to reopen the record to examine the alleged discrepancy between Godwin's application date and Lundin's engineering report date.[34] We shall decline Secrest's request to reopen, for we are bound not only by the very strict threshold erected in *Great Lakes, Liberty Productions* and *Evergreen*, but Secrest has not satisfactorily distinguished *Broadcast Associates of Colorado*, where the conduct (from the Board's perspective) appeared more serious (*see supra* note 32), but the Commission reversed. Its precedent there must control as well.[35]

13. Having been largely unmoved by the exceptions with respect to the ALJ's treatment of Godwin, and likewise agreeing with his ultimate comparative analysis, *see I.D.* paras. 96-97, the Board might properly forego addressing the exceptions of those applicants who would quite obviously rank beneath her under the criteria of the 1965 *Policy Statement*. *See, e.g., Coastal Broadcasting Partners*, 7 FCC Rcd 1432 (1992) (having reversed Board with respect to one of nine competing applicants and finding that same one applicant comparatively superior, the claims of remaining eight applicants were not addressed); *see generally also Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991)("An agency, need not decide questions which are not relevant to its decision.")(quoting *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960)). However, as suggested by our discussion in paras. 9-10, *supra*, certain of Godwin's actions are not immune from any and all criticism. While of the conviction that the ALJ's treatment of both Godwin (and her detractors) provides inadequate grounds for declaring reversible error, the Board, *ex abundanti cautela*, will visit the *I.D.* with respect to Godwin's remaining adversaries.

14. METCALF. Ranked second behind Godwin, *I.D.*, paras. 96-97, and apart from her exceptions directed at Godwin which we have hereinabove discussed, Metcalf's exceptions do not argue that, on a comparative basis, the ALJ erred in ranking her abaft Godwin. On the other hand, Secrest does except to the award of any "integration"

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taking up the cudgels. *See, e.g., David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991)(judicial challenge based on objections of applicant that had much earlier dismissed).

[30] Not to the contrary is *Isis Broadcast Group*, 7 FCC Rcd 5125, 5126-29 (Rev. Bd.), *recon. denied*, 8 FCC Rcd 24 (1992), where the Board affirmed an ALJ's disqualification of one applicant where "[t]he bank had no information about [the applicant] or its partners other than the amount of the loan sought, and no one discussed the terms of a loan with the bank." The Board there also affirmed the ALJ's disqualification of a second applicant, *see id.*, at 5129-30, because that second applicant's banker "testified that the letter he drafted and signed was nothing more than an invitation to apply for a loan and was not intended to suggest that the bank had any present intention to loan the $300,000...." That second banker further testified that "the bank had not received sufficient information to make any decision about a loan." The actions of First Union's James Swanson in the instant case provide a nearly complete antipode.

[31] *See* Secrest Exceptions at 4-13. Secrest adverts to First Coast Exh. 10 (letter to Godwin from John A. Lundin of du Treil, Lundin & Rackley, Inc.)(*reprinted in* Secrest Exceptions at 5).

[32] *See id.*, at 9-10. Indeed, in *Broadcast Associates*, the applicant rehabilitated by the full Commission had not only a discrepancy between her application and engineering report dates, that applicant had also given "richly detailed," but utterly false, deposition testimony, to which lies she later admitted. *See* 100 FCC 2d 616, 622-24 (Rev. Bd. 1985). Still, the Commission disagreed that *that* applicant had evinced an unacceptable "productivity to dissemble" to the agency, and it awarded her the Permit in spite thereof. (The Board Chairman does not agree with this reading of *Broadcast Associates* for the reasons previously stated. 100 FCC 2d at 624-625.)

[33] Cited in Secrest Exceptions at 9. In *Great Lakes*, the Commission reversed the Board's grant of a motion to enlarge where the Board had found that substantial evidence showed that an applicant (now recently awarded the Permit, *see News Release*, Report No. DC-2423, released May 21, 1993) may well have misrepresented "reasonable assurance" of a transmitter site when *that* applicant failed to advise the landowner that she intended (1) to dismantle *his* extant 56.4 meter tower (on which he was currently leasing space to private radio licensees); and (2) to erect instead her *own* 87 meter tower. *See* 5 FCC Rcd 7003 (Rev. Bd. 1990)(citing *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 830 (1990)). In any event, the Commission has:

> emphasized in *Great Lakes* that the provisions of 47 CFR § 1.229 should be strictly enforced, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not have been reasonably discovered earlier, in order to expedite the hearing process and the institution of new service.

Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3188 n.9 (1992); *see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 161 (1990)(§ 1.229 should be adhered to "strictly").

[34] Secrest Exceptions at 12-13.

[35] If there be conflict between the court's decision in *Johnston Broadcasting Co.* and the Commission's decision in *Broadcast Associates of Colorado*, the Commission itself surely did not note any; and this Board -- just as surely -- may not gainsay its own superiors' judgments.

credit to Metcalf, claiming in essence that she is but a front for "her parents and her parents' business associate, Mr. Carter, who because of their common interests in a nearby radio station in Georgia, could not effectively compete for the frequency themselves.[36]

15. *Discussion.* It is well-settled that "[w]hen family relationships are involved ... certain natural relations are presumed among family members..." that do not, standing alone, raise questions about who is the real-party-in-interest or whether the helpful family member has a covert stake. *H. S. Communications, Inc.*, 7 FCC Rcd 6448, 6454-58 (Rev. Bd. 1992)(and cases cited therein).[37] The *I.D.*, at para. 63, did observe "that Metcalf's father was instrumental in getting Ms. Metcalf involved in filing an application in this proceeding, and that he took steps early on in the process to move the application forward." For instance, the father suggested her communications counsel and "agree[d] to provide his daughter with the necessary financial assistance." *Id.* (citing Tr. 513). He arranged the bank financing and is also financing the prosecution of this application, as well as assuming personal liability for the loan. *Id.*, at para. 64 (citing Tr. 535, 539). Additionally, he arranged "for the public inspection file and publication of local notice." *Id.*[38] In the end, however, the ALJ gave Metcalf the benefit of any doubt and honored her credentials. *See id.*, para. 66.

16. There is no denying that, when confronted with fact situations such as that presented here by Metcalf, skepticism is ineluctable. But as discussed in *H. S. Communications*, Commission precedent does tend to require more than simply the presence of a helpful family member, or even an overzealous relative. In this case, however, Secrest is not incorrect that Metcalf's father either came close to the real-party-in-interest line, or possibly crossed it. Metcalf herself did little at hearing to further her own cause. Because not even Metcalf contends that she could prevail over Godwin on a comparative basis, we will decline to formally overrule the ALJ, who after hearing the evidence and observing the witnesses opined that "Ms. Metcalf gave the appearance of an individual with the necessary maturity to assume the responsibilities of general manager of the proposed station." *ID.* at para. 66. Should Godwin fall for any reason, Metcalf's situation can be more closely scrutinized and her claims re-evaluated.

17. SECREST. Whereas Secrest has challenged the *I.D.* respecting Godwin and Metcalf, no exceptor actually touches upon Secrest in return. Finding no basis upon which, *sua sponte*, to modify the ALJ's findings and conclusions, these shall stand as to Secrest.

18. FIRST COAST. Apart from its assault on Godwin's financial qualifications and Metcalf's essential *bona fides*,[39] First Coast insists that the ALJ erred in disregarding its own two-tier corporate structure (voting and non-voting stock), *see id.*, para. 46, and in attributing to First Coast the media interests of its non-voting shareholders for diversification purposes. *See id.*, at paras. 54-56.[40] The ALJ did so because (1) the non-voting shareholders participated in an annual meeting; (2) neither the Articles nor the By-Laws of First Coast proscribe active involvement by the "passive" share-holders; and (3) "[a]ll shareholders can purchase new or additional shares of stock of any class as a matter of right." *See id.*[41] Based on their past actions and future potential, the ALJ not only attributed the media interests of the (currently) non-voting shareholders, he awarded only partial "integration" credit in proportion to the equity of the (currently) voting shareholders. First Coast argues that these ALJ actions were unjustified, as its voting shareholders are "adequately" insulated.[42]

19. *Discussion.* No party hereto has even replied to First Coast's "exceptions." As with Metcalf, we will not reverse the ALJ's findings and conclusions regarding this corporation, chiefly because it could prevail only if both Godwin *and* Metcalf are determined to be thoroughly unqualified. Though there may be merit in some of First Coast's contentions, Marshall appearing *pro se*, has cited no law whatever for his contrary propositions.[43] At the same time, there is merit as well in the ALJ's conclusion that the ownership structure of First Coast could very readily change. Withal, we find an insufficient basis at present to discern a scenario in which First Coast could leapfrog to this Permit. We stop here, since *lex non praecipit inulia, quia inutilis labor stultus.*

20. FERNANDINA. Last, and most definitely least, we come to the applicant whose purported ownership structure was so glaringly bogus that the ALJ, after elaborating on the facts,[44] was moved to state that "no further purpose would be served in determining" the extent (if any) to award credit to Fernandina "or for considering this ap-

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[36] Secrest Exceptions at 14 (citing Tr. 506-08, 511, 517). Metcalf's father owns 50% of Johnson City Broadcasters, licensee of WILI-FM, Wrightsville, Ga. *I.D.*, para. 64.

[37] *Compare Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)(court remands because of complex web of relationships between father and son tying their respective broadcast interests).

[38] The ALJ also reported Metcalf's ignorance of certain aspects of her own application and the FCC application process. *See I.D.*, para. 64.

[39] *See* Secrest Exceptions at 14-19.

[40] First Coast's "Exceptions" (at 3) also mention, *en passant*, that Godwin has "a distant family relationship to Marshall Rowland who owns WAIA-FM in St. Augustine...." It claims that this relationship helped Godwin obtain financing from First Union Bank, *id.*, but its pleadings before us go no further. Nor shall we. *See* 47 CFR § 1.277(a).

[41] The *I.D.* (at para. 54) reports:

> Messrs. Thomas and Bolton, First Coast's non-voting shareholders, are the owners of, respectively, 90 percent and 10 percent of the stock of Design Media, Inc., the licensee of stations WKEU(AM) and WQUL(FM), Griffin, Georgia and WQIS(AM) and WNSL(FM), Laurel, Mississippi. None of these stations are the subject of a'(diversification commitment by either one of these individuals (First Coast, Ex. #2). In view of the finding reached below that the Messrs. Thomas and Bolton are not properly insulated from active involvement in the applicant, their media interests are chargeable to First Coast, and it is subject to a diversification demerit.

[42] *See, e.g.*, First Coast "Exceptions" at 6-8 (describing its corporate structure, capital calls, *etc.*).

[43] In that regard, the ALJ observes that "[o]nly 112 shares of voting stock out of a total of 500,000 shares authorized have been issued." *I.D.* at para. 56.

[44] The full detailed recitation of the ALJ's findings of facts are set forth in the *I.D.* at paras. 26-37, of which the following are a few salient excerpts:

> Mr. [sic] Payne never spoke to Mr. Dunham prior to the filing of the application (Tr. 220), and they did not negotiate over the equity split (Tr. 881). In addition, they

plication further." *Id.*, at para. 37. Aside from excepting to Godwin's finances, exceptions we have treated earlier, Fernandina naturally insists that the ALJ erred in denouncing its two-tiered ownership structure, depicted by Fernandina as a "limited partnership" in which Troy Payne (15% equity) would be the sole "general" partner, while a colleague of her father, Robert Dunham, would hold the remaining 85% as merely a "limited" partner. *See id.*, paras. 26-28.

21. In the recent *Gloria Bell Byrd*, 7 FCC Rcd 7976, 7978-80 (Rev. Bd. 1992), the Board, once again, rehearsed the principles and the case law guiding determinations on whether an applicant has proffered a *bona fide* two-tiered ownership structure or whether, as has frequently been the case, the structure is a fraud contrived purely to skew artificially the comparative profile of the applicant so as to gain various unjustified "preferences." *See, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8156-60 (Rev. Bd. 1989).[45] In *Byrd*, the Board applied the successive injunctions of the Commission ("in order to avoid 'sham' arrangements," Comm'n will closely scrutinize two-tiered applications.),[46] of the District of Columbia Circuit (the FCC *must* "identify and eliminate from participation those applicants who are not *bona fide*"),[47] and even the understanding of the Supreme Court ("[t]he FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants, including minorities").[48] And, in *Byrd*, another dummy "limited partnership" was routed, just as in prior counterfeit models such as *Carta Corp.*, 5 FCC Rcd 3696 (Rev. Bd. 1990), *review denied sub nom. Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991), *recon. denied*, 7 FCC Rcd 4339 (1992); *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2497 (1991), *recon. dismissed*, 7 FCC Rcd 658 (1992).

22. Pressing heavily upon us (albeit out of context) certain language of *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5601 (1991),[49] Fernandina maintains that Dunham's role was limited to "preformation" activities,[50] and that *Evergreen* states that "postformation activities are generally better evidence of who will control." *But* as the *Evergreen* Commission continued:

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never discussed the position Ms. Payne would hold at the radio station (Tr. 887). Although Mr. Dunham maintains a personal financial statement (Tr. 878), Ms. Payne did not see such a statement prior to entering into the partnership agreement (Tr. 353-54, 879). She did not have and does not now have any clear knowledge of Mr. Dunham's income, assets, and liabilities (Tr. 354). * * * Although Ms. Payne was presented with the limited partnership agreement prior to her meeting with [Fernandina counsel] Mr. Schauble (Tr. 261-62) and had received a draft limited partnership agreement from [co-counsel] Mr. Cohen at their initial meeting (Tr. 264), Ms. Payne did not have anyone independent of her communications counsel review the agreement prior to signing it (Tr. 265). * * * At her deposition, Ms. Payne knew very little about how the applicant came into existence. For example, she had no knowledge of how the equity split was arrived at (Tr. 267); no independent understanding of her obligation to perform services for the partnership (Tr. 271); and little or no knowledge or understanding of how Mr. Dunham's contribution figure was arrived at (Tr. 272-75). In addition, she did not know when Mr. Dunham made his first contribution to the partnership (Tr. 275); she did not know how Mr. Dunham came to sign the limited partnership agreement (Tr. 277); and she did not have a full understanding of the fee arrangement with her communications counsel (Tr. 332), which was arrived at between Mr. Cohen and Mr. Dunham (Tr. 332). * * * Ms. Payne also did not know the name of her engineer at deposition (Tr. 278), or how he came to be hired (Tr. 301), or what the fee arrangement was with the engineer (Tr. 302). When Ms. Payne met with Mr. Schauble, the transmitter site had already been selected (Tr. 278), and she had nothing to do with its selection (Tr. 278). Ms. Payne did not speak to the owner of the original site (Tr. 303), or correspond with the owner of the site (Tr. 303). Ms. Payne did, however, obtain Fernandina Beach FM's second transmitter site (Tr. 321). * * * Ms. Payne first saw the Fernandina Beach FM financing letter on November 28, 1991 (Tr. 281). The financing letter was given directly to Mr. Dunham (Tr. 873-74, 875). Ms. Payne had no knowledge of how he acquired the letter (Tr. 283), and she did not submit any information to the lending institution or speak to the bank (Tr. 285-87). In addition, Ms. Payne, at her deposition, had no independent knowledge of what her obligations might be under the agreement with the bank (Tr. 282), of how the station's budget figures were determined (Tr. 289), nor did she discuss the costs of constructing the station with anyone (Tr. 289-90); and, after Fernandina Beach FM amended to a new transmitter site, Ms. Payne did not conduct an independent review of the station's budget to see if the figures set forth therein were still appropriate (Tr. 318-19). * * * At the hearing, however, she modified her earlier deposition testimony by indicating that she did discuss the figures with her attorney (Tr. 290-91). As to her proposed salary, Ms. Payne stated that she had no input as to her salary figure (Tr. 297). * * * Ms. Payne's contribution, financial and otherwise, to the actual prosecution of the application has been minimal at best. For example, she has paid only incidental expenses associated with prosecuting the application, such as the fees for sending various documents by Federal Express (Tr. 300-01). Although she claimed at the hearing that she had hired her attorney (Tr. 222), at the deposition she indicated that she thought it was Mr. Dunham (Tr. 222). Ms. Payne did make capital calls; however, they were done at the direction of her counsel (Tr. 348-51, 363-64, 365-67), and she kept Mr. Dunham informed about the partnership through these capital calls (Broomeco, Ex. #6).

[45] *Modified*, 5 FCC Rcd 5610 (1990), *aff'd per judgment sub nom. Southeast Florida Limited Partnership v. FCC*, 947 F.2d 505 (D.C. Cir. 1991).

[46] *See* 7 FCC Rcd at 7979 (quoting *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982)).

[47] *See* 7 FCC Rcd at 7979 (quoting *Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507, 511 (D.C. Cir. 1992)(internal quotes omitted)).

[48] *See* 7 FCC Rcd at 7978-79 (quoting *Metroplex Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3025 n.48 (1990)).

[49] *See* Fernandina Exceptions at 4, 9.

[50] *See id.*, at 4-12.

> Citing *Victory Media, Inc.* and *Royce*, EVI argues that pre-formation activities are not a basis for discrediting an applicant's ownership structure. But in *Royce* at n.13, we noted that "[i]n *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission reaffirmed the principle set forth in *KIST Corp.*, 102 FCC 2d 288 (1985), that it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is *bona fide*. *Id.* at 2753 n.4." In this respect, *Coast TV* expressly overruled *Victory* and reiterated the relevance of such activities under *KIST*. Thus, to the extent that EVI cites *Victory* for the proposition that pre-formation activities are not probative of who will control the ongoing business, *Coast TV* makes clear that *pre-formation involvement by purportedly passive principles remains a pertinent consideration in evaluating the reliability of an applicant's ownership structure*. Indeed, citing *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶ ¶ 14-21 (1990), we explained in *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2499 n.5 (1991), that "the pre-formation record [may] raise[] questions that, standing alone, could ... justif[y] rejecting the applicant's proposal."

6 FCC Rcd at 5601 (emphasis added).[51] After absorbing the record here and contemplating Fernandina's exceptions, we ardently affirm the *I.D.* Fernandina's ownership structure is a flagrant hoax, *see, e.g.*, note 44, and its application 3--at *best* [52] -- is worthless.

CONCLUSION

23. All of the decisional exceptions having been addressed,[53] and as signaled above, we affirm the rulings, findings of fact and conclusions of law of the ALJ insofar as here discussed, and we accord with the *I.D.'s* grant to Godwin. We have recognized that Godwin's actions were not in all ways "perfect"; but we find no basis in the record or the exceptions to take her down altogether.

24. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed December 7, 1992, January 7, February 12, and March 26, 1993 by Martin A. Secrest ARE GRANTED, and the amendments ARE ACCEPTED; and

25. IT IS FURTHER ORDERED, That the application of Annette B. Godwin (File No. BPH-891129MF) for a construction permit for a new FM station at Fernandina Beach, Florida, is GRANTED; that the applications of Fernandina Beach FM Limited Partnership (File No. BPH-891129MH) Martin A. Secrest (File No. BPH-891130MH) and Emily Metcalf (File No. BPH-891130MO) ARE DENIED; and that the applications of Mardirossian Broadcasting, Inc. (File No. BPH-891130MP) and Broomeco Broadcasting, Inc. (File No. BPH-891130MR) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[51] The quoted reference to *Royce Int'l. Broadcasting*, 5 FCC Rcd 7063, 7064 n.10 (1990), is where the Commission further explained the circumstances under which it would reject as disingenuous a purported two-tier ownership structure:

> For example, the applicant may have been formed in a manner that is irreconcilable with the exercise of sound business judgment. That is, it may appear that the individuals organizing the applicant are giving away control or ownership in a manner that is patently unreasonable if taken at face value. *See Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990). *Cf. KIST Corp.*, 102 FCC 2d 288, 292 para. 8, 292-93 n.11 (1985) (where it appeared unbelievable, under the circumstances, that an investor would give away control of the broadcast applicant to an individual who would make no investment).

By that *Royce* standard alone, Fernandina *must* be eliminated. *Marlin Broadcasting, supra* note 47.

[52] In *Berlin Communications, Inc. v. FCC*, 626 F.2d 869, 875 (D.C. Cir. 1979), the court not only affirmed the FCC's fatal dispatch of a broadcast regulatee, it also admonished this agency that when it concurrently encountered fraudulent activity it ought additionally refer such activity to the Dept. of Justice for possible criminal action. With all due respect, the Board believes that "as part of its ongoing efforts to discourage the filing of sham or abusive applications," *R. J. Winter, supra* note 4, 7 FCC Rcd at 2236, the Commission might consider the suggestion of *Berlin* and refer applications such as that of Fernandina (and any successors) to Justice for possible prosecution under, *e.g.*, 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 1341 (mail fraud). A few successful prosecutions, we daresay, might heartily assist the Commission in the "ongoing" anti-sham campaign adverted to by the Commission in *R. J. Winter*.

[53] Because we find the matter of Fernandina's transmitter site to be absolutely nondecisional, we have not and shall not address the reply pleading of the Mass Media Bureau. Nonetheless, the Board appreciates its participation on this technical matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-154

In the Matter of

Amendment of Part 74-E Rules,
Aural Broadcast Auxiliary
Stations.

NOTICE OF PROPOSED RULE MAKING

Adopted: June 1, 1993; **Released: June 16, 1993**

Comment Date: August 9, 1993
Reply Date: August 24, 1993

By the Commission:

INTRODUCTION

1. By this *Notice of Proposed Rule Making*, we propose to amend Section 74.550 of our rules to permit certain unapproved transmitters in the band 944-952 MHz,[1] to be used for backup purposes at Aural Broadcast Auxiliary Stations operating in accordance with Part 74 Subpart E.

BACKGROUND

2. In 1985, the Commission adopted a *Report and Order* in MM Docket No. 85-36 which required all new transmitters for aural studio transmitter-link/ intercity relay (STL/ICR) operation in the 944-952 MHz frequency band to be approved prior to marketing. The order also grandfathered transmitters manufactured before 1985 "to allow their use for a five year period ending on July 1, 1990. At the end of 1989 the Society of Broadcast Engineers (SBE) and National Public Radio (NPR) requested that the Commission extend the 1990 deadline until July 1, 1993. Both parties argued that unforeseen developments in the broadcast marketplace had led to less congestion than was originally anticipated, so that the requested relief would not cause undue harm. On January 12, 1990, the Chief, Mass Media Bureau granted the requested deadline extension in an *Order*, 5 FCC Rcd 738. That *Order* emphasized that all existing STL/ICR transmitters in use after July 1, 1993 must be approved under the Commission's equipment approval process. In view of the considerable time that has been allowed for compliance with this requirement, we do not believe any further extension of the July 1, 1993 deadline for primary equipment is necessary.

DISCUSSION

3. After July 1, 1993, all Part 74, Subpart E Aural Broadcast Auxiliary Service Station[2] transmitters operating in the 944-952 MHz band that have not been approved under the Commission's equipment authorization procedures may no longer be used for regular day-to-day service. However, it is our understanding that many broadcast station licensees install backup auxiliary service station equipment to avoid undue disruption in programming should the regular auxiliary transmitter fail or require servicing. Strict compliance with Section 74.550 would require that all aural service station transmitters not in use, and which have not been approved under the Commission's equipment authorization program, be entirely removed from service by July 1, 1993. This would also require licensees to bear the cost of replacing their infrequently used backup equipment with approved transmitters.

4. Various parties have suggested informally that the Commission should permit the use of unapproved aural transmitters for backup purposes. This would avoid burdening licensees with unnecessary expenditures, would permit the installation of backup facilities in situations which have not previously been reasonable, and would conserve both public and private resources which would otherwise have to be spent on requests for waivers to use unapproved equipment for backup purposes.

5. In light of the above, we propose to allow all transmitters removed from such primary service to be retained for backup purposes, provided that such transmitters will not be used for more than 720 cumulative hours per year without explicit Commission authority. This use of non-approved equipment will also be restricted to those situations where no interference will be caused to existing aural broadcast service stations and where there will be no impediment to the establishment of new aural broadcast service stations. By "backup purposes" we mean temporary use necessary to restore and maintain regular service because the primary transmitter unit has failed or requires servicing. The 720 hour figure equals 30 full days and mirrors the time permitted under Section 74.24 for short-term operations. We believe that this period of time is ample enough to allow for backup use, yet short enough not to undermine the intent of the rule or to encourage abuses. Any licensee wanting to use unapproved equipment for a period greater than 720 hours would have to receive explicit Commission approval in advance.

6. In view of the short time remaining before the July 1, 1993, deadline, we will suspend enforcement of Section 74.550 to the extent that it requires the use of approved transmitters for backup purposes. In this way, licensees will be relieved of the burden of spending scarce funds on the replacement of infrequently used backup equipment. It will

[1] The scope of this upgrade requirement also includes grandfathered stations operating on the previously authorized frequency band 942-944 MHz. In this regard, the 942-944 MHz frequency band remains available for use by aural STL/ICR stations operating in Puerto Rico. See § 74.502(a). These users are also required to bring their equipment into compliance by July 1, 1993. We propose to allow use of non-complying equipment for backup purposes by these stations as well.

[2] An aural broadcast auxiliary station is a fixed station used to transmit aural program material between the studio and the transmitter of a broadcasting station, between various types of broadcasting facilities, or between relay points. See § 74.531.

also allow licensees to retain unapproved equipment for backup purposes until final action is taken in this proceeding, and thereafter if the proposed rule is adopted.

PROCEDURAL MATTERS

7. *Ex Parte Rules - Non - Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte, presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

8. *Regulatory Flexibility.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant negative economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Pub. L. No. 96-354.94 Stat.1164.5 U.S.C. Section 601 et seq (1981).

9. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **August 9, 1993** and reply comments on or before **August 24, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street. N.W., Washington, D.C. 20554.

10. *Paperwork Reduction Act* - The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new modified information collection requirement on the public.

11. IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, that effective upon publication of this *Notice of Proposed Rule Making* in the Federal Register, enforcement of Section 74.550 of the Commission's rules is suspended, in part, to the extent that it prohibits the use of unauthorized equipment operating in the band 944-952 MHz for backup purposes; provided, however, that such use may cause interference to, or impede the establishment of other aural broadcast auxiliary links, and is not used for more than 720 cumulative hours per year.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend Title 47 of the Code of Federal Regulations as follows:

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. It is proposed to revise Section 74.550 to read as follows:

§74.550 Equipment authorization

Each authorization for aural broadcast STL, ICR, and booster stations shall require the use of notified or type accepted equipment, except that operation of 944-952 MHz equipment, which has not been type approved under the equipment authorization program may continue until July 1, 1993, after which equipment must be approved. Equipment which has not been type approved under the equipment authorization program and which was in service prior to July 1, 1993, may be used after July 1, 1993, solely for temporary uses necessary to restore or maintain regular service provided by approved equipment, because the main or primary unit has failed or requires servicing. Such temporary uses may not interfere with or impede the establishment of other aural broadcast auxiliary links, and may not occur during more than 720 cumulative hours per year. Requirements for obtaining a grant of equipment authorization are contained in subpart J of part 2 of the Rules. Equipment designed exclusively for fixed operation shall be authorized under notification procedure (see § 2.904(d) of this chapter).

Note: Consistent with the note to § 74.502(a), grandfathered equipment in the 942-944 MHz band and STL/ICR users of these frequencies in Puerto Rico are also required to come into compliance by July 1, 1993. The backup provisions described above apply to these stations also.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-206

In re Applications of

SACRED HEART UNIVERSITY, INC.
Channel 202B1
Shirley, New York

File No. BPED-891215MD

For Construction Permit for
New Educational FM Station

LONG ISLAND UNIVERSITY
Channel 202B1
Southampton, New York

File No. BPED-900522MI

For Modification of the
Facilities of Station WPBX(FM)

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1993; **Released: June 17, 1993**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Long Island University (LIU) and Sacred Heart University, two noncommercial educational broadcast applicants, filed a joint motion for approval of settlement agreement and suspension of procedural dates on April 14, 1993, which the Bureau supported in comments filed April 28, 1993. We will grant the joint motion finding that it satisfies the requirements of the Commission's rules, 47 CFR 73.3525(a), which implements Section 311(c)(3) of the Communications Act, 47 USC 311(c)(3). The settlement will serve the public interest by terminating litigation, not only in this case, but possibly in another pending noncommercial comparative proceeding. We also find, pursuant to 47 CFR 73.3525(b), that dismissal of one of the applications in this case will not unduly impede the distribution of radio services, for the reasons set out below.

2. *Background:* On September 8, 1992, the Board, in accordance with past practice, suspended the procedural dates in this case after the parties indicated that a settlement was being negotiated. *See Maricopa County Community College District*, 6 FCC Rcd 4241 (Rev. Bd. 1991) (granting similar extension of time to allow settlement of noncommercial comparative proceeding). The Board's action was designed to allow time for the Commission to act upon certain translator applications which the parties and Bureau indicated would facilitate a settlement not only of this case but also in another comparative hearing proceeding pending before Administrative Law Judge Gonzalez (MM Docket No. 91-157). On January 29, 1993, the Commission granted the translator applications in *Sacred Heart University*, 8 FCC Rcd 672 (1993). That *Order* is now final, and the applicants in this case have filed their joint motion to implement the settlements.

3. In its comments at ¶ 2, the Bureau accurately describes the related settlements involving four different applicants, and we hereby adopt that statement of the facts:

> The settlement agreement in this proceeding is part of a global settlement which will allow two proceedings involving noncommercial educational stations serving Long Island, New York, to be settled. The instant settlement agreement calls for [1] grant of LIU's application for modification of the facilities of station WPBX(FM), Southampton, New York, and for dismissal of Sacred Heart's application for a new station at Shirley, New York. In consideration for the dismissal of Sacred Heart's application in this proceeding, LIU, as part of a settlement agreement filed in MM Docket No. 91-157, has requested dismissal of its application for Noyack, New York. Dismissal of LIU's application for Noyack, in that proceeding, will permit [2] the grant of construction permit applications filed by Sacred Heart for Noyack, and [3] Connecticut Public Broadcasting, Inc. for Southampton, New York, and [4] the grant of an application by the State University of New York (SUNY) for modification of the facilities of WUSB(FM) Stony Brook, New York. . . . The parties to the instant settlement agreement request that the Board approve the settlement agreement subject to the acceptance and grant of amendments in MM Docket No. 91-157 and approval of the pending settlement agreement in that docket. The Mass Media [Bureau] is filing on this day comments in support of approval of the settlement agreement and acceptance of the amendments filed in MM Docket 91-157.

DISCUSSION

4. Exhibit 2 to the joint motion contains declarations under penalty of perjury by the applicants' principals establishing, as required by 47 CFR 73.3525(a), that (a) their applications were not filed for an improper purpose, and (b) the public interest would be served by approving the settlement agreement which would terminate this costly litigation, conserve the resources of the litigants in this and another case, and expedite the provision of new services by some four different applicants. However, a Section 307(b) issue was designated for hearing in this case to ascertain which applicant would best provide a fair, efficient and equitable distribution of radio service. *See Hearing Designation Order*, 6 FCC Rcd 4606, 4607 ¶ 10 (MMB 1991). We must therefore decide, as required by 47 CFR 73.3525(b), whether a dismissal of Sacred Heart's application will "unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities," and, if it does, "order that further opportunity be afforded for other persons to apply for the facilities specified in the application" before acting upon the request for approval of the agreement.

5. In his *Initial Decision*, 7 FCC Rcd 3466 (1992), Administrative Law Judge Chachkin had found that a grant of the Sacred Heart application would best achieve the objectives of Section 307(b) because it would provide the first noncommercial educational service to 117,233 persons and a second such service to 44,864 persons, whereas LIU's

application would only provide a first such service to 69,460 and a second service to none. 7 FCC Rcd at 3470 ¶ 48. Sacred Heart would provide to the community of Shirley, New York its first transmission outlet, while LIU's community of Southampton, New York already has one aural outlet, WPBX-FM, which is proposing to improve its facilites in this case. *Id.*

6. It is significant that in approving the grant of Sacred Heart's translator applications, the Commission observed that the translator applications and settlement of the two protracted comparative hearing proceedings "present the Commission with a unique situation and an unusual opportunity to afford NCE service to unserved and underserved areas." *Sacred Heart, supra,* 8 FCC Rcd at 673. It further found that:

> Without grant of SHU's [Sacred Heart's] translators, implementation of the settlement agreement will not occur, only two of the full-service facilities can be built or upgraded and new service to the public will be delayed. Grant of the ... translator applications will immediately provide first NCE service to 136,523 people. Although this may represent a small fraction of the listeners in the service area, it is a significant number. In addition, when the total settlement agreement, if approved, is implemented, SHU, LIU, SUNY and CPB will provide first NCE-FM service to 22,867 more people and additional NCE-FM service to almost 1.3 million others.

Id.

7. We agree with the Mass Media Bureau that the ALJ's Section 307(b) determination in this case did not consider the additional service which the Commission's subsequent approval of the translator applications would permit the four applicants in this and the MM Docket 91-157 proceedings to provide. When the totality of service that will be provided, including new first NCE service to more than 150,000 persons and additional service to nearly 1.3 million people, is considered, "it is clear that the dismissal of the Sacred Heart application for Shirley will enhance rather than impede the distribution of radio service on Long Island, New York." Bureau Comments at ¶ 5. We, therefore, hold that new publication pursuant to Section 73.3525(b) is not required.

8. ACCORDINGLY, IT IS ORDERED, That the Joint Motion for Approval of Settlement Agreement and Suspension of Procedural Dates, filed on April 14, 1993, by Sacred Heart University, Inc. and Long Island University IS GRANTED; that the procedural dates ARE SUSPENDED; that the settlement agreement IS APPROVED; that the application of Sacred Heart University, Inc., File No. BPED-891215MD, IS DISMISSED; that the application of Long Island University for modification of the facilities of Station WPBX(FM), Southampton, New York, File No. BPED-900522MI, IS GRANTED; and that this proceeding IS TERMINATED subject to acceptance of the amendments and approval of the settlement agreement pending in MM Docket No. 91-157.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Review of Part 74 of the
Commission's Rules

ORDER

Adopted: June 8, 1993; Released: June 16, 1993

By the Chief, Mass Media Bureau:

1. The Commission revises Part 74 of its Rules, to ensure the consistency and accuracy of the Rules. We first amend Section 74.602 to correspond with associated regulations in 47 CFR Section 2.106. Second, we amend Section 74.931 to reinsert language inadvertently omitted from the text of the Code of Federal Regulations. This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public. For this reason, we believe that this revision will serve the public interest. This information is amended as part of the Agency's oversight function.

2. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because this amendment only clarifies and corrects the existing language of Part 74, prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, this amendment may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

3. Therefore, IT IS ORDERED, that pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Part 74 of the FCC Rules and Regulations IS AMENDED as set forth below, effective upon publication in the Federal Register.

4. For further information on this *Order*, call Rita S. McDonald, Policy and Rules Division at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 74 is amended as follows:

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTION SERVICES

1. The authority citation for Part 74 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, as amended; 47 U.S.C. 154, 303.

2. Section 74.602 is amended by revising footnotes US219 and US222 following paragraph (a) to read as follows:

Section 74.602 Frequency assignment.

* * * * *

US219 In the band 2025-2110 MHz, Government Earth resources satellite Earth stations in the Earth exploration-satellite service may be authorized to use the frequency 2106.4 MHz for Earth-to-space transmissions for tracking, telemetry, and telecommand at the sites listed below. Such transmissions shall not cause harmful interference to non-Governmental operations.

US222 In the band 2025-2035 MHz geostationary operational environmental satellite Earth stations in the space research and Earth exploration-satellite services may be authorized on a coequal basis for Earth-to-space transmission for tracking, telemetry, and telecommand at the sites listed below:

Wallops Is., Va. $37^0 50' 48"$ N., $75^0 27' 33"$ W. Seattle, Wash. $47^0 34' 15"$ N., $122^0 33' 10"$ W. Honolulu, Hawaii $21^0 21' 12"$ N., $157^0 52' 36"$ W.

* * * * *

3. Section 74.931 is amended by adding paragraph (a)(1) to read as follows:

Section 74.931 Purpose and permissible service.

(a) ***

(1) All applicants that do not list accredited schools as receive sites must name the school(s) and the degree(s) or diploma(s) for which the formal programming will be offered and describe the administration of the course(s). They must submit documentation, written or signed by the authorities responsible for the schools' curricula, verifying each of these points.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO Letter 22
June 10, 1993

Released: June 17, 1993

Responsible Accounting Officers:

Re: Uniform Accounting for Postemployment Benefits in Part 32

The purpose of this letter is to provide guidance with respect to adopting Statement of Financial Accounting Standards No. 112 (SFAS-112), "Employers' Accounting for Postemployment Benefits" in Part 32, Uniform System of Accounts for Telecommunications Companies.

SFAS-112 was issued by the Financial Accounting Standards Board (FASB) in November 1992, and covers accounting for benefits listed in paragraphs 4 and 5 of the Statement. It requires the accrual method of accounting for these benefits instead of the pay as you go method and is mandatory for fiscal years beginning after December 15, 1993, although the FASB encourages earlier implementation. Therefore, to be in compliance with generally accepted accounting principles (GAAP), companies must account for postemployment benefits on the accrual basis on or before January 1, 1994.

The Ameritech Operating Companies (Ameritech) and US West Communications, Inc. (US West) on December 22, 1992, and February 22, 1993, respectively, filed notices of intent to adopt SFAS-112. These notices were filed pursuant to Section 32.16 of the Commission's rules, which requires carriers to apply new standards adopted by the FASB and provides for automatic Commission approval unless the Commission notifies carriers otherwise within 90 days after receiving a notice.[1]

We allowed Ameritech to adopt SFAS-112 for regulatory purposes under the automatic approval provision of §32.16. We did not object to Ameritech's notice because the carrier was adopting SFAS-112 pursuant to the requirements set forth in SFAS-112 and was doing so at the same time it was adopting SFAS-112 for financial reporting purposes. We denied the US West notice, however, in a letter dated April 26, 1993, because the US West proposal requested permission to use a three year phase-in instead of the flash-cut approach that is required by SFAS-112.

To avoid any confusion that could occur as a result of the above actions, this letter provides directions for adoption of SFAS-112. Carriers that have not yet adopted SFAS-112 are required to do so under the provisions of §32.16.

Timing of Adoption. Carriers will adopt SFAS-112 for regulatory accounting purposes using the same effective date they use for financial reporting purposes, but no later than January 1, 1994.

Notification. Each carrier shall file a notice of intent to adopt SFAS-112 90 days prior to adopting the standard, with October 1, 1993, being the last day to file notice in order to meet the January 1, 1994, mandatory adoption date. This notice shall provide us with the interstate revenue requirement impact for the current year and a projection for the next three years. An example of the format to be used in making this revenue requirement filing is attached.

Accounts to be Utilized. Carriers shall use the following accounts to record entries related to SFAS-112.

1. Catch-up Entry. To record the effects of the catch-up entry, carriers should charge Account 6728, Other general and administrative, and credit Account 4310, Other long term liabilities.

2. Cash payments. Cash payments made during the year for postemployment benefits will be charged to Account 6728, Other general and administrative, for all items not specifically required to be charged to the expense matrix, pursuant to §32.5999(f). The payroll related postemployment cash payments currently subject to the Expense matrix requirements in §32.5999(f) shall continue to be recorded through the matrix.

3. Annual Liability Adjustment. The postemployment liability recorded in Account 4310, Other long term liabilities, will be adjusted at least annually based on claims data with contra entries to Account 6728, Other general and administrative.

This letter is issued pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, must be filed within 30 days of the date of this letter. *See* 47 C.F.R. §1.4(b)(2).

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

[1] 47 C.F.R. §32.16.

ATTACHMENT

CARRIER _____

ESTIMATED INTERSTATE REVENUE REQUIREMENT IMPACT RESULTING FROM IMPLEMENTATION OF SFAS 112 (POSTEMPLOYMENT BENEFITS) (in Millions)

	1994	1995	1996	1997
1. SFAS No. 112 Accrual Amounts				
2. Pay-As-You Go Amounts				
3. Incremental Expense				
4. Incremental Revenue Requirement				

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mallard Computer System
Easton, MD

NAL/Acct. No. 315HF0018

NOTICE OF APPARENT LIABILITY

Adopted: June 10, 1993; **Released: June 17, 1993**

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, ("the Act"). 47 U.S.C. §503(b), to Mallard Computer Systems for willful violation of Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. The appropriate amount of forfeiture for the violation is $7,000.

II. BACKGROUND

3. On July 16, 1992, Mallard Computer Systems had on display, in its retail store located at #8 Tred Avon Square, Easton, MD 21601, a Class B personal computer advertised as the "Mallard SX 16/20/25". *See* Section 15.3(s), 47 C.F.R. §15.3. This device, also referred to by Mallard representatives as the Mallard 386 SX "Mini-Tower", has not been authorized or certified by the FCC as required by Section 15.101 of the Commission's Rules, 47 C.F.R.§15.101.

4. On August 31, 1992, the Commission's Laurel field office issued Mallard an official notice of violation and requested a response. Mallard's September 25, 1992, response denied that the company had ever engaged in either selling or advertising a 386 SX computer system. In its response, Mallard's Vice President, Paul Fountain, contended that the equipment on display in the store was several years old and was not for sale. He stated that the device was displayed solely because it resembled the "386 SX Mini-Tower (the IDEAL SX Mini-Tower)," and that this equipment was authorized under FCC ID No. I37IDEAL 386 DX.

5. On October 30, 1992, the Authorization and Evaluation Division of the FCC issued an Official Notice to Mallard Computer System. The Notice indicated that the FCC ID No. submitted by Mallard was approved for a Baby AT Desktop and not the IDEAL SX Mini-Tower indicated in Mallard's September response. The October notice gave Mallard 30 days to submit a written response regarding the unapproved Mini-Tower. To date, Mallard has not responded to the October notice.

III. DISCUSSION

6. The marketing of equipment, which is required to be, but has not been, authorized by the Commission is a violation of Section 302 of the Act and of Section 2.803 of the Commission's Regulations.

7. It is also a violation of the FCC Rules to market equipment under an FCC ID number which was not validated by a grant of equipment authorization. *See* 47 C.F.R. Section 2.926(e). The equipment on display at Mallard's store was a Class B personal computer lacking any form of authorization. Mr. Fountain admitted that the equipment was being displayed because it resembled the 386 SX Mini-Tower computer which was being sold by Mallard. The FCC ID number provided by Mallard granted authorization for the marketing of a "Baby AT Desktop" computer, but does not grant authority for marketing a "Mini-Tower". Commission records do not indicate that an authorization was ever issued for the 386 SX "Mini-Tower". Thus, both the 386 SX Computer System and the equipment on display were uncertified equipment being marketed by Mallard in violation of Section 2.926(e).

8. Further, Mallard has failed to respond to Commission's October 1992 Notice of Violation and request for further information regarding the steps taken to cease the marketing of the unauthorized computers.

IV. CONCLUSION

9. Pursuant to the Commission's policy for assessing forfeitures, *see Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*) and Section 503(b)(2) of the Act, the base forfeiture amount for marketing equipment without authorization is $7,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, and Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, that Mallard Computer Systems, is APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $7,000 for marketing unauthorized equipment in violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set out in Section 503(b) of the Act.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Mallard Computer Systems shall, within thirty (30) days of release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements

regarding inability to pay must be supported by appropriate documentation.[1] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No. 315HF0018
RM 744, Mail Stop AC/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 315HF0018" and mailed to the following address:

Federal Communications Commission
P.O. Box 7348214
Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that this notice shall be sent by certified mail to Mallard Computer Systems, #8 Tred Avon Square, Easton, MD 21601.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-163

In the Matter of

Amendment of Section 73.202(b) RM-8251
Table of Allotments,
FM Broadcast Stations.
(Wilson Creek, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 4, 1993; Released: June 17, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Wilson Creek Broadcasting Company ("petitioner"), permittee of Station KVYF-FM, Channel 277A, Wilson Creek, Washington, proposing the substitution of Channel 277C3 for Channel 277A at Wilson Creek and the modification of its construction permit to specify operation on the higher powered channel.[1] Petitioner states its intention to apply for the channel, if allotted.

2. We believe that the public interest would be served by proposing the substitution of Channel 277C3 for Channel 277A at Wilson Creek, Washington, since it could provide the community with a wide coverage area FM service. Channel 277C3 can be allotted to Wilson Creek in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (16.6 miles) southeast of the community at the petitioner's requested site.[2] Since Wilson Creek is located within 320 kilometers (200 miles) of the U.S-Canadian border, concurrence by the Canadian government has been requested. As requested, we also propose to modify Station's KVYF-FM's construction permit to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 277C3 at Wilson Creek or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Wilson Creek, Washington	277A	277C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brett E. Miller
11608 Blossomwood Court
Moorpark, California 93021
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the

[1] Although petitioner's request indicates that the original copy of his proposal was signed, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any documentation filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in his comments.

[2] The coordinates for Channel 277C3 at Wilson Creek are North Latitude 47-22-00 and West Longitude 119-00-30.

other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-204

In the Matter of

Amendment of Section 73.202(b),	RM-8058
Table of Allotments,	RM-8081
FM Broadcast Stations.	RM-8126
(Chenoa, Lincoln and Pontiac, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 4, 1993; Released: June 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* ("*Notice*"), 7 FCC Rcd 5611 (1992), issued in response to a petition for rule making filed by L & M Broadcasting Company, Inc. ("L & M"), licensee of Station WESZ(FM), Channel 230A, Lincoln, Illinois, proposing the substitution of Channel 230B1 for Channel 230A at Lincoln, Illinois, and the modification of its license to specify operation on the higher class channel (RM-8058). Livingston County Broadcasters, Inc. ("Livingston"), licensee of Station WJEZ(FM), Channel 229A, Pontiac, Illinois, filed a petition for rule making requesting the substitution of Channel 229B1 for Channel 229A at Pontiac, Illinois, which we have treated as a counterproposal in this proceeding (RM-8081).[2] In response to the *Notice*, L & M filed comments reaffirming its intention to apply for Channel 230B1, if allotted. Livingston filed comments and a counterproposal seeking to change Station WJEZ's community of license from Pontiac, Illinois, to Chenoa, Illinois, and substitute Channel 229B1 for Channel 229A at Chenoa (RM-8126).[3] Livingston's proposal to upgrade Station WJEZ(FM) on Channel 229B1 and its proposal to change the community of license from Pontiac to Chenoa for Station WJEZ(FM) on Channel 229B1 are both mutually exclusive with L & M's proposal to substitute Channel 230B1 for Channel 230A at Lincoln, Illinois. L & M filed a statement for the record and reply comments. Livingston filed comments in response to the counterproposals. After the record closed, Livingston and L & M filed a joint petition requesting approval of a resolution agreement.[4]

2. Based on the above information, we believe the public interest would be served by substituting Channel 230B1 for Channel 230A at Lincoln and by substituting Channel 229B1 for Channel 229A at Pontiac, and by modifying the authorizations for Station WESZ(FM), Lincoln and Station WJEZ(FM), Pontiac, in accordance with Section 1.420(g) of the Commission's Rules. Channel 230B1 can be allotted to Lincoln in compliance with the Commission's minimum distance separation requirements with a site restriction 19.1 kilometers (11.9 miles) southwest, in order to avoid a short-spacing to Station WKZW(FM), Channel 227B, Peoria, Illinois.[5] Channel 229B1 can be allotted to Pontiac in compliance with the Commission's minimum distance separation requirements with a site restriction 13.2 kilometers (8.2 miles) south, in order to avoid a short-spacing to Station WJTW(FM), Channel 228A, Joliet, Illinois and Station WGFA(FM), Channel 231B, Watseka, Illinois.[6]

3. We note that the allotment of Channel 229B1 to Pontiac at reference coordinates 40-45-53 and 88-35-28 will be short-spaced to a construction permit (File No. BPEX-920810MF) for experimental operation on Channel 228A at Urbana, Illinois. This construction permit would cause objectionable interference to Channel 229B1 at Pontiac. Since experimental operations are granted subject to summary rescission or modification without prior notice, right to hearing or any procedural recourse, U.S.A. Digital Radio, L.P. will be ordered to modify its construction permit or terminate operation on Channel 228A at Urbana, when Station WJEZ(FM) commences operation on Channel 229B1 at Pontiac. *See* 47 C.F.R. §74.112.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lincoln, Illinois	230B1
Pontiac, Illinois	229B1

[1] The communities of Chenoa and Pontiac, Illinois, have been added to the caption.

[2] Station WJEZ(FM) presently operates on Channel 276A. However, a *Report and Order* was adopted on December 12, 1990, in MM Docket No. 90-137 granting the substitution of Channel 229A for Channel 276A at Pontiac, Illinois. This action became effective February 19, 1991. *See* 6 FCC Rcd 26 (1991). An application (File No. BPH-920421IF) to increase Station WJEZ(FM)'s power to 6 kW on Channel 229A at Pontiac, Illinois, is pending.

[3] Public Notice of the counterproposals was given November 24, 1992, Report No. 1919, (RM-8081, RM-8126).

[4] In this resolution agreement, Livingston and L & M request that the Commission allot Channel 230B1 to Lincoln, Illinois, at reference coordinates 40-00-00 and 89-29-00 and Channel 229B1 to Pontiac, Illinois, at reference coordinates 40-45-53 and 88-35-28. This agreement eliminates the conflict between Livingston's and L & M's proposals. In accordance with Section 1.420(j) of the Commission's Rules, Livingston and L & M state that their agreement makes no provision for compensation by either party. Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we believe acceptance of this pleading will serve the public interest, because this agreement resolves conflicting issues in this proceeding. In light of this agreement, we will dismiss Livingston's counterproposal to change its community of license from Pontiac to Chenoa, Illinois, and all comments responsive thereto will not be discussed

[5] The coordinates for Channel 230B1 at Lincoln are North Latitude 40-00-00 and West Longitude 89-29-00.

[6] The coordinates for Channel 229B1 at Pontiac are North Latitude 40-45-53 and West Longitude 88-35-28.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of L & M Broadcasting Company for Station WESZ(FM), Lincoln, Illinois, IS MODIFIED, to specify operation on Channel 230B1 in lieu of Channel 230A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Livingston County Broadcasters, Inc., for Station WJEZ(FM), Pontiac, Illinois, IS MODIFIED, to specify operation on Channel 229B1 in lieu of Channel 229A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, L & M Broadcasting Company, Inc., licensee of Station WESZ(FM), and Livingston County Broadcasters, Inc., licensee of Station WJEZ(FM), are required to submit a rule making fee in addition to the fee required for the application to effect the respective upgrades.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the permittee of Channel 228A, Urbana, Illinois, as follows: U.S.A Digital Radio L.P., 1100 Wilson Boulevard, 27th Floor, Arlington, VA 22234.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Livingston County Broadcasters, Inc., seeking to change the community of license from Pontiac to Chenoa, Illinois, and substitute Channel 229B1 for Channel 229A at Chenoa, Illinois, (RM-8126) IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-45

In the Matter of

Amendment of Section 73.202(b), RM-8186
Table of Allotments,
FM Broadcast Stations.
(Kealakekua, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 4, 1993; Released: June 17, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 1792 (1993), issued in response to a petition for rule making filed by Visionary Related Entertainment, Inc. ("petitioner"), permittee of Station KAOY(FM), Channel 268C3, Kealakekua, Hawaii, proposing the substitution of Channel 268C1 for Channel 268C3 at Kealakekua, Hawaii, and the modification of Station KAOY(FM)'s construction permit to specify operation on the higher class channel. Petitioner filed comments restating its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 268C1 for Channel 268C3 at Kealakekua, Hawaii, as it would provide the community with a wide coverage area FM service. Channel 268C1 can be allotted to Kealakekua in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.8 kilometers (13.6 miles) north of the community.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KAOY(FM) to specify operation on Channel 268C1 at Kealakekua, Hawaii.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Kealakekua, Hawaii	268C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KAOY(FM), Kealakekua, Hawaii, IS MODIFIED, to specify operation on Channel 268C1 in lieu of Channel 268C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Visionary Related Entertainment, Inc., permittee of Station KAOY(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 268C1 at Kealakekua are North Latitude 19-42-56 and West Longitude 155-55-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-164

In the Matter of

Amendment of Section 73.202(b) RM-8248
Table of Allotments,
FM Broadcast Stations.
(Williamstown, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 4, 1993; Released: June 17, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James Phillips ("petitioner"), proposing the allotment of Channel 245A at Williamstown, West Virginia, as its first local aural transmission service. Petitioner states his intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 245A at Williamstown, West Virginia, since it could provide the community with its first local aural transmission service. Channel 245A can be allotted to Williamstown in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) southwest of the community to avoid a short-spacing to Station WRRK, Channel 245B Braddock, Pennsylvania.[1] Since Williamstown is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Williamstown, West Virginia	--	245A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 245A at Williamstown are North Latitude 39-22-18 and West Longitude 81-31-04.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-165

In the Matter of

Amendment of Section 73.202(b), RM-8247
Table of Allotments,
FM Broadcast Stations.
(Athens, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 4, 1993; Released: June 17, 1993

Comment Date: August 9, 1993
Reply Comment Date: August 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James Phillips ("petitioner") requesting the allotment of Channel 240A to Athens, Ohio, as the community's second local commercial FM channel. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 240A to Athens since an interest has been expressed in providing the community with an additional commercial FM service. Channel 240A can be allotted to Athens in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.6 kilometers (7.2 miles) east-northeast to avoid short-spacings to Station WHOK, Channel 238B, Lancaster, Ohio, and Station WKWS, Channel 241B, Charleston, West Virginia.[1] Canadian concurrence in the allotment is required since Athens in located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Athens, Ohio	288A	240A, 288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 9, 1993,** and reply comments on or before **August 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belendiuk, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240A at Athens are North Latitude 39-22-08 and West Longitude 81-58-42.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-83

In the Matter of

Amendment of Section 73.202(b), RM-8191
Table of Allotments,
FM Broadcast Stations.
(Pocomoke City, Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1993; Released: June 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2141 (1993), proposing the allotment of Channel 223A to Pocomoke City, Maryland, as that community's second FM broadcast service.[1] The *Notice* was issued in response to a petition filed by Robert L. Purcell ("petitioner"). Petitioner filed comments in support of the allotment of Channel 223A at Pocomoke City and stated his intention to file an application for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 223A to Pocomoke City, Maryland, in order to provide the community with a second FM broadcast service. As indicated in the *Notice*, Channel 223A can be allotted to Pocomoke City in compliance with the Commission's spacing requirements without a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 2, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pocomoke City, Maryland	223A, 293A

4. The window period for filing applications for Channel 223A at Pocomoke City will open on **August 3, 1993,** and close on **September 2, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* incorrectly stated Channel 223A would provide Pocomoke City with its first local service instead of a second service. Station WMYJ, Channel 293A, is licensed to Pocomoke City.

[2] The coordinates for Channel 223A at Pocomoke City are 38-04-30 and 75-34-12.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1993

COMMISSION VIEWS "VALLEY" LOTTERY DECISION AS PERMITTING CASINO ADVERTISING ON NEVADA BROADCAST STATIONS

The Commission's Office of General Counsel and the Mass Media Bureau have received numerous inquiries concerning the April 13, 1993, decision of the United States District Court for the District of Nevada in *Valley Broadcasting Company* v. *United States*, Case No. CV-S-92-400-PMP (RJJ). In the *Valley* decision, the court found that the restrictions on the broadcast of lottery information contained in Title 18 United States Code, Section 1304, and Section 73.1211 of the Commission's Rules, as applied to advertisements for legal casino gaming on television stations KVBC(TV), Las Vegas, Nevada, and KRNV(TV), Reno, Nevada, violated the licensees' First Amendment rights. In the interest of clarifying its position on the reach of that decision, the Commission is issuing this Public Notice.

In its First Amendment analysis of the ban, the court applied the four part analysis established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), for evaluating the constitutionality of governmental restrictions on commercial speech. In striking down the ban, the court recognized that the federal government has an interest in protecting state choices on public policy issues such as gambling. But, it concluded that the government's interest was only remotely advanced in this case. In the instant case, the court found that the audiences of the plaintiff television stations were overwhelmingly in Nevada and that the State of Nevada had evidenced its public policy of permitting and promoting "legitimate and intensely regulated casino gaming which is free from criminal and corruptive elements." *Slip Op.* at 16. Thus, the court concluded, there was no reasonable fit between the government's interest and the regulation.

We expect this decision to be appealed. Pending the resolution of any appeal, however, the Commission will not enforce the ban on the broadcast of lottery information with respect to the broadcast of advertisements for, or information concerning, legal casino gaming on stations licensed to communities in Nevada. We take this action to reduce uncertainty for broadcasters within the District Court's jurisdiction and to preserve the Commission's resources during the appellate process.

For further information contact: Jane Mago, Office of the General Counsel, (202) 632-7112, or Roger Holberg, Mass Media Bureau, (202) 632-3922.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

CyberTel Corporation File No. 315HF0010

Notice of Apparent Liability
for Station in
the Public Land Mobile
Service at Galesburg, Illinois

NOTICE OF APPARENT LIABILITY

Adopted: June 2, 1993; Released: June 11, 1993

By the Commission:

1. On June 12, 1992, personnel from the Federal Communications Commission Chicago Field Office (FCC) inspected Station KSJ824, licensed to CyberTel Corporation (CyberTel) at Galesburg, Illinois. The station was found to be operating in violation of the Commission's Rules. Section 22.506 permits a maximum effective radiated power (ERP) of 500 watts. CyberTel's authorization permits it to operate at this power. However, CyberTel was found to be operating with an ERP of 976 watts. As a result of this inspection, an Official Notice of Violation was issued on August 28, 1992.[1]

2. CyberTel claims in its response to the Official Notice of Violation[2] that the excess ERP resulted from an inadvertent error in setting the transmitter output power by the contractor hired to install the equipment. According to CyberTel, this error was due to confusion created by two relocations of the station over a short period of time. In the spring of 1989, the antenna tower collapsed when a farmer accidentally cut the tower guy lines at CyberTel's original site. The transmitter was, pursuant to a properly authorized Special Temporary Authority (STA), temporarily relocated to Abingdon, Illinois, while the original antenna tower was being rebuilt. Once the Commission granted regular authority for a new site at Galesburg, CyberTel relocated the transmitter.

3. CyberTel claims that the error in setting the output power occurred because different sets of engineering specifications existed for the facility (one set for the original site, another set for the site operated under STA, and still a third set for the new site). Due to the absence of interference complaints and the indication from the contractor that the station was constructed properly, the incorrect power setting went unnoticed, according to CyberTel. CyberTel states that alarm circuits to the transmitters, which would detect any increase in power beyond that authorized by the Commission, are now being installed. Furthermore, CyberTel claims that prompt inspections of all facilities that were constructed by outside contractors are being instituted to ensure that the construction was completed in accordance with the station license.

4. Section 22.506(a) of the Commission's Rules states in pertinent part:

> (a) *Base stations.* Base stations shall not exceed 500 watts effective radiated power except for base stations in the 470-512 MHz and the 929-932 MHz band which shall not exceed the power limits in the 470-512 MHz and the 929-932 MHz band which shall not exceed the power limits in §§22.501 (1) and 22.205(b), respectively.

Moreover, the Rules expressly provide that a licensee is liable for the acts of a contractor. Section 22.205(b)(2) of the Commission's Rules states:

> The licensee shall remain fully responsible for the quality of maintenance, for compliance with all the Commission's rules, and for the general instruction given to the contractor.

Therefore, because CyberTel was exceeding the ERP limits defined in Section 22.506 of the Commission's Rules and because it failed to operate within the required ERP limits, CyberTel is in apparent violation of Sections 22.506(a) and 22.205(b)(2) of the Commission's Rules.

5. Section 503(b) of the Communications Act states in pertinent part:

> (1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B)... willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rules, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that CyberTel's operation in excess of the maximum allowed ERP was continuous up to June 12, 1992. Consequently, CyberTel's operation constitutes willful and repeated conduct within the terms of the statute.[3]

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[1] *See* CyberTel Corporation, Station KSJ824, Galesburg, Ill., Official Notice of Violation, File No. 92-3923M, released August 28, 1992.

[2] *See* letter to P. Bradford from G. Lothian, received at FCC Field Office, Chicago, Ill., Sept. 9, 1992.

[3] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) (*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States.

Section 312(f)(2) of the Communications Act provides:

6. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for exceeding ERP power limits is $50,000. Under the circumstances, no adjustments of the forfeiture appear appropriate.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, IT IS ORDERED that CyberTel Corporation IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Fifty Thousand Dollars ($50,000) for willful violations of the aforementioned rules provision. This amount was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80 (f)(3) of the Commission's Rules, 47 C.F.R. 1.80, that CyberTel Corporation, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[4] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 315HF0010" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 315HF0010
Stop Code 1500E3
1919 M St. NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail --return receipt requested, to:

CyberTel Corporation
C/O Glenn Lothian
100 Ludwig Drive
Fairview Height, IL 62208

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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the term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

The definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

[4] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC. File No. BPH-880505MS

MICHELLE N. TERZYNSKI File No. BPH-880505PL

For Construction Permit for
New FM Station on Channel 277A,
Holly Hill, Florida

Appearances

Kathryn R. Schmeltzer and *John K. Hane, III*, on behalf of Central Florida Communications Group, Inc.; and *Michael R. Miller*, on behalf of Michelle N. Terzynski.

DECISION

Adopted: June 9, 1993; Released: June 18, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member GREENE.

1. In an *Initial Decision*, 7 FCC Rcd 6773 (1992), Administrative Law Judge Richard L. Sippel (ALJ) granted the application of Michelle N. Terzynski (Terzynski) to construct a new FM station at Holly Hill, Florida, after concluding that she was "the only remaining applicant who is basically qualified." 7 FCC Rcd at 6792 ¶ 141. Two disqualified applicants, Holly Hill Radio Partners and Walo Broadcasting Limited Partnership, did not file exceptions and their applications were dismissed for failure to prosecute by separate *Order*. *Central Florida Communications Group, Inc.*, 8 FCC Rcd 193 (Rev. Bd. 1993). However, Central Florida Communications Group, Inc. (Central Florida), which the ALJ concluded would be the comparative winner were it financially qualified, filed exceptions. The sole issue presented by those exceptions is whether the ALJ erred in concluding that Central Florida was financially unqualified.[1] We have reviewed the *Initial Decision* in light of the pleadings and hearing record and conclude that the record supports the ALJ's conclusion.[2]

2. Central Florida is a two-tiered Florida corporation with two voting shareholders, Charles W. Cherry, Sr. and his wife, Julia T. Cherry. *Initial Decision*, 7 FCC Rcd at 6774 ¶ 13. The non-voting shareholders are the Cherrys' two sons, Glenn and Charles, II; a daughter, Cassandra Jenkins; and a cousin, Stanley Monts. *Id.* It was Ms. Cherry who certified in the application that Central Florida was financially qualified. *Id.* at 6777 ¶ 27. The issues specified against Central Florida read as follows:

> (A) To determine whether [Central Florida] was financially qualified to be a Commission licensee when it filed its Form 301 application.
>
> (B) To determine whether [Central Florida] is presently financially qualified to be a Commission licensee.
>
> (C) To determine whether [Central Florida] violated Section 1.65 by failing to report the loan of $80,000 in January 1989, the obtaining of a bank letter in July 1989, and the bank merger and whether that merger adversely affected the bank letter of July 1989.
>
> (D) To determine whether evidence adduced under Issues A, B and C above, establishes that [Central Florida] misrepresented or was lacking in candor in the prosecution of its application.

Memorandum Opinion and Order, FCC 91M-2567, released August 19, 1991. Issue C with respect to Section 1.65 and Issue D with respect to misrepresentation were resolved in Central Florida's favor. *Initial Decision*, 7 FCC Rcd at 6787-6788 ¶ ¶ 112, 116.

3. On May 5, 1988, when the application was filed, Central Florida estimated that it would need $316,300 for construction and initial operation of the Holly Hill facility and another $61,800 for the prosecution of the application. *Id.* at 6777 ¶ 27. The Cherrys intended to meet those costs from their personal funds, and Ms. Cherry based her financial certification on a "net worth statement" prepared by Charles Cherry on April 1, 1988 reflecting a net worth of $800,000. *Id.* at 6776-6777, 6787 ¶ ¶ 25, 28, 111. At hearing, Central Florida submitted a document, Central Florida Exh. 5, to establish that it had reasonable assurance of the requisite funding when certifying. That exhibit consists of four pages of written testimony by Ms. Cherry and forty-eight bound attachments. Included within the attachments are the financial statement of April 1, 1988; a second

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[1] Although she did not file exceptions, Terzynski's reply brief challenges the *Initial Decision's* conclusion that Central Florida would be the comparative winner if basically qualified. Specifically, Terzynski urges a diminution of the quantitative integration credit awarded Central Florida, arguing that its integration proposal is not credible. Central Florida, in turn, moves to strike that argument from Terzynski's brief as unauthorized and untimely. We shall grant Central Florida's motion to strike. *See* 47 CFR § 1.277(a) ("Any objection not saved by exception filed pursuant to this section is waived."). *See generally Edwin A. Bernstein*, 6 FCC Rcd 6841, 6843 n.1 (Rev. Bd. 1991) ("Henceforth, the Board will ... summarily dismiss any pleadings seeking to augment exceptions or to raise new matter.").

[2] Central Florida's exceptions contain a request for oral argument. Terzynski also filed a request for oral argument but later withdrew it and opposed Central Florida's request for argument. We shall deny Central Florida's request because it appears that oral argument would not materially assist in the resolution of the case.

financial statement dated June 30, 1991; a bank loan commitment letter dated July 28, 1989; and a miscellany of purportedly supporting documentation.

4. On review of the evidence adduced, the ALJ remarked:

> The record made by [Central Florida] on the financial issue is difficult to follow and analyze because it is not set forth with clear references to sources. [Central Florida's] Exh. 5 consists of a four page textual declaration of Mr. and Mrs. Cherry and 48 tabbed documents which are not tied into the declaration narrative. The proposed findings and reply briefs in general assert conclusions with little reference to transcript testimony and tabbed documentation.

Id. at 6778 n.12. Nonetheless, he was able to conclude that Central Florida had established that it could rely on no more than $89,000 in liquid assets to cover total prosecution, construction and operation costs of $378,100. *Id.* at 6778-6779 ¶ 37. In calculating the $89,000 figure, the ALJ excluded the following assets listed on the April 1, 1988 financial statement: (a) Cherrys' stock, bonds and securities because there was no showing they were listed securities or otherwise readily marketable investments; (b) accounts receivable because there was no showing they were current or collectible in the short term; (c) an insurance cash value because of various inconsistencies in the amount claimed; and (d) a bank account subsumed under the cash rubric because it appeared to be a trade or business account that was subject to rapid deposits and withdrawals, *id.* at 6777 ¶ ¶ 28, 30, 31.

5. The ALJ further discounted Central Florida's real estate assets because appraisals were lacking. *Id.* at 6778 ¶ ¶ 34, 37. A real estate investment listed on page 2 of the April 1, 1988 financial statement was also omitted because the investment was controlled by the Cherrys' son, Charles II, and there was no evidence that the latter was willing to liquidate the holdings. *Id.* at ¶ 34. The ALJ culminated his analysis of the financial statement by rejecting its reliability, adverting to a disclaimer by the accountant (Central Florida Exh. 5, Attach. 47) that the latter "had not audited or reviewed the accompanying statements of financial condition," that the Cherrys' "have elected to omit substantially all of the disclosures required by generally accepted accounting principles," and that if those matters were included "they might influence the user's conclusions about the financial condition of Charles W. and Julia Cherry." *Initial Decision*, 7 FCC Rcd at 6778 ¶ 36. Based on the foregoing, the ALJ held that Central Florida lacked reasonable assurance of funding at the time it certified its financial qualifications.

6. Although noting that his holding above rendered moot the issue of present financial ability, the ALJ nonetheless concluded that Central Florida's subsequent financial statement of June 30, 1991 did not show a substantial improvement in the Cherry's liquid assets. *Id.* at 6787 ¶ 111. He valued the 1991 liquid assets at $120,140. *Id.* 6778-6779 ¶ 37. A disclaimer (Central Florida Exh. 5, Attach. 48) similar to the one relating to the 1988 statement was made by the accountant with respect to the 1991 statement. *Initial Decision*, 7 FCC Rcd at 6778 ¶ 36. The ALJ also accorded no weight to the bank letter dated July 28, 1989. *Id.* at 6778 ¶ ¶ 33, 36. He stated that there was no affirmative evidence that the loan commitment would be honored because the bank from which the letter was secured had subsequently merged into another bank and Central Florida had not obtained a letter from the successor bank that the loan commitment was still in effect. *Id.* at 6778, 6788 ¶ ¶ 33, 36, 113.

7. In its exceptions, Central Florida challenges the ALJ's evaluation of personal assets available to the Cherrys at the time of certification, arguing that it is entitled to rely on their non-liquid assets to meet expenses because the former are significantly in excess of the resources needed from those assets. More particularly, Central Florida argues that when the Cherrys' real estate with documented values are sold, those parcels would be sufficient, when added to the liquid assets, to permit the construction and operation of the station. Central Florida had tried below to show the value of the real property by proffering a 1991 purchase offer and a valuation in an insurance policy. It further argues that prosecution costs should not have been included in the amount it was required to demonstrate available, because such costs are paid as they are incurred. Thus, it contends that it had to show only $316,000 available to cover costs. Finally, Central Florida argues that its bank letter was a viable alternative source of financing and that no one has offered any evidence to show that the loan commitment is no longer valid. It attaches to its brief a letter from the successor bank dated November 16, 1992 reaffirming the terms and conditions of the July 28, 1989 bank letter "word for word." Attach. A of Exceptions.

8. The Commission's financial standard requires that an applicant demonstrate that it possessed reasonable assurance of funding when it certified, either in the form of net liquid assets on hand or from other committed sources, so as to enable it to construct and operate the station for three months without reliance on revenues. *See Coast TV*, 5 FCC Rcd 6720, 6722 (Rev. Bd. 1990). In the extraordinary case, an applicant may also demonstrate its financial qualifications by non-liquid assets where the "ratio between the net worth and loan commitment is exceedingly high and the subject net worth is based on adequate appraisals of fair market value." *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991) (subsequent history omitted), citing *Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 656 ¶ 12 (Rev. Bd. 1983) (ratios of 54:1, 16:1, and 22:1 acceptable); *see also Real Life Educational Foundation of Baton Rouge, Inc.*, 8 FCC Rcd 2675, 2676 (1993). The applicant may not "certify its financial qualifications and then arrange financing." *Pepper Schultz*, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986) (subsequent history omitted). Similarly, an augmented financial proposal cannot be relied upon in the absence of a showing that the applicant "had reasonable assurance of necessary financing at the time it filed its application." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ 13 (1991); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5761 ¶ 6 (subsequent history omitted). The burden of demonstrating that it is financially qualified is on the applicant. *Aspen*, 6 FCC Rcd at 1603 ¶ 9.

9. Here, we are unable to conclude that the applicant met its burden of demonstrating that it was financially qualified at the time of certification. Except for the overall

objection that the ALJ's holding is erroneous, Central Florida has not pointed out with any specificity the alleged errors committed by the ALJ.[3] Rather, it simply asserts:

> "the accountant's statement[] reflect[s] liquid assets (cash and cash surrender value of life insurance) of $244,030 in 1988 and .... [t]he value of the remaining non-liquid assets net of liabilities [note omitted] and estimated taxes was $538,035 in 1988 which is over four times the $72,270 [it] needed in addition to liquid assets in 1988 to demonstrate funds amounting to $316,300.... Since the value of the Cherrys' non-liquid assets is significantly in excess of the resources needed from those assets, the Cherrys were entitled to rely on their non-liquid assets, in addition to their liquid assets, to support [the] financial certification.
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> * * *
>
> Second, ... [the Cherrys] also had specific parcels of real estate with documented values that could be sold to realize the remaining amounts needed.... These two parcels of property alone are thus sufficient to provide [the applicant] with at least $189,000 to meet its estimated costs of construction and operation. Exceptions at 15-17.[4]

10. Those bare assertions are not sufficient to show error on the part of the ALJ nor are they persuasive that Central Florida carried its burden of proof at hearing. An examination of the April 1, 1988 financial statement, Central Florida Exh. 5, Attach. 2, in conjunction with the *Initial Decision* reveals that the ALJ properly addressed the assets enumerated therein, providing reasons that have not been disputed or shown to be incorrect as to why particular assets were not credited.[5] The financial statement, itself, is in large part conclusory. It does not identify the assets or substantiate the validity of the asserted values or their ready convertibility. Thus, with respect to the accounts receivable, the statement simply lists an amount, omitting all other information including the required showing that they were sufficiently aged to be considered. *See Port Huron Family Radio, Inc.*, 5 FCC Rcd at 4563 n.6. Similarly, the stocks, bonds, and securities are not identified or shown to be readily marketable. *See Vista Broadcasting Co., Inc.*, 18 FCC 2d 636, 637 (Rev. Bd. 1969) (absence of proof of marketability affords no reasonable assurance that funds will be available). The amount of cash listed on the first page of the statement ($101,000) does not correspond with a detailed breakdown of the cash in banks enumerated on the statement's second page and the exceptions are silent concerning this matter. Similarly, the aggregate cash value of insurance listed on the first page of the statement does not correspond with the cash values of the individual policies specified on statement's second page. It was incumbent on the applicant to set forth clearly its finances to meet its burden of proof on the issue. *See generally Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 433 n.3 (Rev. Bd. 1992) (Board has no obligation to fashion arguments for the parties) (subsequent history omitted). It has not done so here.[6]

11. Moreover, the ALJ properly rejected from consideration the real estate assets since they were not supported by valid appraisals. *See Texas Communications Limited Partnership*, 6 FCC Rcd at 5193 ¶ 14; *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1985 ¶ ¶ 8-9 (Rev. Bd. 1987). Central Florida has not cited any support that an insurance policy can act in lieu of a valid appraisal; and Mr. Cherry testified he had no knowledge of how the insurance company determined the insurance value of the property. Tr. 387. And, the purchase offer, proffered in lieu of an appraisal for the second parcel of real estate, reflects, at best, the value of the property in 1991, or three years after certification, and the record is silent as to whether the offer was *bona fide*. No showing has been made as to the property's value at the time of certification.[7] Additionally, the ratio of the real estate assets to Central Florida's commitment is substantially less than the ratios that have been deemed acceptable in the past. *See generally Texas Communications Limited Partnership*, 6 FCC Rcd at 5194 n.7 (slightly more than 2:1 ratio not enough).[8] The

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[3] Central Florida does quibble with a harmless error and an obvious slip of the pen by the ALJ; *i.e.*, the ALJ's statement that the 1989 bank letter was obtained on advice of new counsel (*Initial Decision* at ¶ 32) when the letter was actually secured more than two years earlier than the 1991 retention of new counsel (Exceptions at 9); and his reference to the figure of $800,000 on the April 1, 1988 financial statement as "liquid assets" (*Initial Decision* at ¶ 112) rather than net worth (Exceptions at 13).

[4] Central Florida Exh. 5, Attachs. 47 and 48, which are statements prepared by the Cherrys' accountant of their financial condition as of April 1, 1988 and June 30, 1991 enumerate approximate figures to those found on the financial statements prepared by the Cherrys, and it is the accountant's figures that Central Florida uses in its exceptions. The differences between the accountants' documents and the Cherrys' financial statements are, for purposes here, inconsequential.

[5] We disagree with the ALJ only insofar as he included the $61,800 prosecution costs in the total expenses the applicant had to show available to meet the issue. *See generally Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562, 4563 ¶ 6 (1990); *Muncie Broadcasting Corp.*, 54 RR 2d 42, 46-47 ¶ 14 (legal costs generally do not detract from financial qualifications where the applicant has paid them on an ongoing basis) (subsequent history omitted); *compare Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1229 n.1 (D.C. Cir. 1993) (legal fees in arrears and possible disagreement about costs of prosecution); *see also Coast TV*, 5 FCC Rcd at 6721-6722 ¶ ¶ 8-10. That error is harmless here.

[6] Because it is non-decisional in light of our disposition, we do not reach Central Florida's claim that the disclaimers concerning the financial statements are of no moment inasmuch as the accountants' merely followed acceptable procedures and language routinely used for the compilation of such statements.

[7] The property in Atlanta, Georgia, is listed in the application as the address of Cassandra Jenkins, the Cherrys' daughter. In response to an argument that Central Florida would have funding available from assets of a real estate investment controlled by Charles Cherry, II, the ALJ observed that the argument was "almost a tacit admission that Cherry, Sr. would control [the asset] through [his son] or that [his son] would have an active interest in the applicant." 7 FCC Rcd at 6778 ¶ 34.

[8] Central Florida's figure of $538,035, *see* para. 9, *supra*, includes its claimed aggregate non-liquid assets, many of which were not documented at all. Assuming Central Florida had reliably documented its claimed $386,000 in real estate listed on its 1988 financial statement, the ratio is less than 2:1 if the ALJ's figures are used or 2.8:1 if the best case figures calculated by Terzynski are used. Terzynski Reply Exceptions at 14.

Commission presumes that an applicant will be able to honor its financial commitment "[w]here a small amount of money must be obtained from a large amount of non-liquid assets," *see United Artists Broadcasting, Inc.*, 4 RR 2d 453, 459 (Rev. Bd. 1964), but requires a larger ratio where there is no assurance that a sale at the time the funds are needed will yield the requisite amount. Thus, a comfortable cushion is required. *See also Opal Chadwell*, FCC 88I-045, released May 5, 1988 (specific purchase offer may reflect subjective value of the asset to the prospective buyer but exceed the asset's objective value); *Margaret Escriva*, 6 FCC Rcd 4455, 4457 ¶ 14 (Rev. Bd.), *recon. dismissed*, 6 FCC Rcd 5391 (1991) (accord). Because Central Florida did not have reasonable assurance of financial qualifications at the time of certification, it is not entitled to rely on the bank letter obtained on July 28, 1989, *see Marlin Broadcasting of Central Florida*, 5 FCC Rcd at 5751 ¶ 6, even assuming its continuing validity. *See also Texas Communications*, 6 FCC Rcd at 5192 ¶ 7 (applicant must take procedural step of filing an amendment and a good cause showing to make a new bank letter part of its proposal).[9] In sum, the record supports the ALJ's conclusion that Central Florida had no reasonable assurance at certification of adequate funding for the construction and operation of a broadcast station.[10]

12. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike, filed December 15, 1992 by Central Florida Communications Group, Inc. IS GRANTED; and

13. IT IS FURTHER ORDERED, That the application of Michelle N. Terzynski (File No. BPH-880505PL) for a construction permit for a new FM station at Holly Hill, Florida IS GRANTED, and the application of Central Florida Communications Group, Inc. (File No. BPH-880505MS) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[9] Because it is non-decisional, we do not reach the issue whether Central Florida is currently financially qualified. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2296 ¶ 3 (1991) ("An agency, like a court, need not decide questions which are not relevant to its decision.") (subsequent history omitted).

[10] If Central Florida were not disqualified on the financial qualifications issues, we would ask the parties to file supplemental briefs on the question of whether the significant familial business relationships among the voting and non-voting shareholders require the attribution of the latters' equity and media interests to the applicant. *See* findings regarding these relationships in *Initial Decision*, 7 FCC Rcd at 6774, 6778-6779, 6788-6789 ¶ ¶ 9-10, 14-15, 34, 41-43, 117-118; *see also* n.7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 11, 1993

GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC. REQUESTS WAIVER OF SECTION 61.41 OF COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: July 12, 1993
REPLY COMMENTS: July 26, 1993

On June 2, 1993, Golden West Telecommunications Cooperative, Inc. (Golden West) filed a petition for waiver of Sections 61.41(c) and 69.3(e)(11) and (i)(4) of the Commission's Rules, 47 C.F.R. §§ 61.41(c), 69.3(e)(11) and 69.3(i)(4). Golden West wishes to acquire outstanding stock of Contel of South Dakota, Inc. through Golden West Telephone Properties, Inc., a wholly-owned subsidiary of Golden West. Contel of South Dakota will continue to operate as a local exchange company and will operate separately from Golden West.

Golden West requests waiver of the above rule sections so that Contel of South Dakota may be subject to rate-of-return regulation after the acquisition is completed; that company, as part of the Contel Corporation and GTE Corporation, is currently subject to price cap regulation. Golden West also requests waiver of the rules so that Contel of South Dakota may concur in NECA's Tariff F.C.C. No. 5 and may participate in the NECA common line and traffic sensitive pools as cost companies. Contel of South Dakota will change its name no later than 60 days after the stock purchase is completed. Golden West states that grant of the waivers is in the public interest because the acquisition will result in greater efficiencies in management and customer service and the offering of intraLATA equal access.

Interested parties may file comments on this petition for waiver no later than **July 12, 1993.** Replies should be filed by **July 26, 1993.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection
with Local Telephone Company
Facilities

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1993; Released: June 9, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Expanded Interconnection Order*, the Commission generally required Tier 1 local exchange carriers (LECs) to offer expanded interconnection for interstate special access services through physical collocation and to file implementing tariffs by February 16, 1993.[1] The Commission provided an exemption from the physical collocation requirement for LECs operating in states that issue a formal decision in favor either of virtual collocation or of allowing LECs to choose between physical and virtual collocation for intrastate expanded interconnection.[2] In order to qualify for the exemption, the state had to act and the LEC had to file its request for exemption by February 16.

2. From December 1992 through April 1993, eight state public utility commissions and the National Association of Regulatory Utility Commissioners (NARUC) filed petitions requesting that the Commission either extend the February 16 deadline for state action or grant waivers from that deadline.[3] Based on the record compiled as a result of these petitions, we find that, in light of the limited state interests at stake and the importance of proceeding with the implementation of physical collocation, the period that the Commission established for state action was reasonable. Accordingly, we deny the petitions.[4]

II. BACKGROUND

3. In the *Expanded Interconnection Order*, the Commission concluded that LEC provision of expanded interconnection would serve the public interest. Specifically, the Commission found that increased competition resulting from expanded interconnection should increase LEC incentives for efficiency and customer responsiveness; foster the development of new technology; increase customer choice, route diversity, and redundancy; and reduce prices for LEC services subject to competition.[5] Based on the record, the Commission found that almost all interconnectors believe strongly that "physical collocation best ensures that they are provided interconnection on the same terms and conditions as the LECs interconnect their own circuits."[6] In furtherance of the Commission's commitment to ensure fair opportunities for all market participants, including interconnectors, to compete in providing access services, the Commission required LECs to make physical collocation available to all interconnectors that request it.[7] The Commission provided, however, that LECs could seek an exemption from the physical collocation requirement based on a:

> formal decision by a state legislature or public utility regulatory agency, after proceedings allowing all interested parties a reasonable opportunity to be heard, in favor of virtual collocation rather than physical collocation for intrastate expanded interconnection, or in favor of allowing LECs to choose which form of interconnection to use for intrastate expanded interconnection.[8]

The Commission also found that there was no need to preempt existing state programs in order to permit initial implementation of expanded interconnection for interstate special access.[9]

III. POSITIONS OF THE PARTIES

A. Petitions and Supporting Comments

4. Six of the state petitioners as well as NARUC request that the Commission waive the February 16 deadline for state action until at least late 1993. NARUC requests waiver of the February 16 deadline for filing both virtual and physical collocation tariffs and requests that the Commis-

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[1] *Expanded Interconnection with Local Telephone Companies*, 7 FCC Rcd 7369, 7389-90 (1992) (hereinafter *Expanded Interconnection Order* or *Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992). Although the Puerto Rico Telephone Company is a Tier 1 LEC, we excluded it from the requirements of the *Order* because it is a NECA pool member. *Expanded Interconnection Order*, 7 FCC Rcd at 7398.

[2] *Expanded Interconnection Order*, 7 FCC Rcd at 7390-91. This exemption is referred to as the state exemption.

[3] A list of the parties filing petitions, oppositions/comments, and replies is provided in Appendix A.

[4] The Commission delegated to the Chief, Common Carrier Bureau, authority to act on requests for exemption from the requirement that LECs make physical collocation available to interconnectors. *Expanded Interconnection Order*, 7 FCC Rcd at 7390 n.95.

[5] *Expanded Interconnection Order*, 7 FCC Rcd at 7380.

[6] *Id.* at 7389.

[7] *Id.* at 7389-90.

[8] *Id.* at 7391.

[9] *Id.* at 7488. We also tried to coordinate federal and state expanded interconnection offerings in two respects. We required that in addition to physical collocation, LECs make virtual collocation available in study areas where intrastate virtual collocation is provided. *Id.* at 7490. We also required LECs that offer both interstate and intrastate expanded interconnection using either physical or virtual collocation to do so in a manner that satisfies both federal and state requirements. *Id.*

sion extend the filing date to at least March 1994.[10] North Dakota requests that the Commission extend the February 16 deadline until at least February 1994.[11] Florida requests that the Commission extend its February 16 deadline until December 31, 1993 for Tier 1 LECs operating in Florida.[12] California requests that the Commission waive the deadline for Tier 1 LECs in California until December 31, 1993, or until California adopts a final state policy on collocation, whichever occurs first.[13] Illinois and Indiana each request that the Commission not require physical collocation tariffs to be filed until at least November 30, 1993.[14] Missouri requests that the Commission extend the February 16 deadline indefinitely to allow it sufficient time to finalize the adoption of a proposed rule on expanded interconnection.[15]

5. Two other state petitioners request that the Commission waive the February 16 deadline for state action for more limited periods. Idaho seeks an extension of the February 16 deadline until March 26, 1993.[16] Oklahoma requests that the Commission grant a waiver of the February 16 state exemption deadline to both Tier 1 LECs operating in Oklahoma, Southwestern Bell and GTE.[17]

6. All eight states argue that the Commission should extend the state action deadlines to provide them an opportunity to complete expanded interconnection proceedings and decide their intrastate collocation policies.[18] NARUC argues that despite good faith efforts, the majority of states will not be able to meet the February 16 deadline. NARUC further argues that those states that require legislative action to issue a final decision on collocation lack a realistic opportunity to meet the Commission's deadline.[19] A number of parties, primarily state public utility commissions and Tier 1 LECs, filed comments or replies supporting petitioners' arguments that 120 days is not sufficient time to weigh interconnection issues and adopt a final intrastate collocation decision, especially since it took the FCC three years to complete its proceeding.[20] NARUC and SW Bell contend that the February 16, 1993, deadline is

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[10] NARUC Petition at 4-5. As an alternative to granting the requested extension, NARUC requests that the Commission require only virtual collocation tariffs to be filed by February 16, 1993, and permit subsequent physical collocation tariffs reflecting completed state proceedings to be filed in early 1994. *Id.* at 5.

[11] North Dakota Petition at 2. North Dakota states that it is questionable whether a twelve-month extension would be sufficient to allow it to reach a final decision concerning interconnection tariff requirements. *Id.* North Dakota further states that it initiated a wide-ranging proceeding in August 1989 concerning, in part, the development of competitive markets for communications services. According to North Dakota, the report of a workshop established in that proceeding is scheduled to be presented on March 9, 1993. North Dakota also states that the state legislature is considering telecommunications legislation on expanded interconnection issues. *Id.* at 1-2.

[12] Florida Petition at 4.

[13] California Petition at 1. California further requests that such companies be allowed to file tariffs on February 16 that offer, at the option of the LEC, either physical or virtual collocation. California proposes that these tariffs would remain in effect until either California adopts a final state collocation policy or December 31, 1993. *Id.* California states that it will soon be initiating a proceeding, which is expected to run until the end of 1993, to establish generic collocation policies within the state. *Id.* at 3.

[14] Illinois Petition at 1; Indiana Petition at 1-2, 5. Illinois states that it began a collocation proceeding on October 21, 1992. Illinois further states that because of the notice and comment requirements of the Illinois Administrative Procedures Act, it is impossible for Illinois to issue a formal order regarding interconnection before November 30, 1993. Illinois Petition at 5.

> Indiana states that it initiated an investigation concerning expanded interconnection on December 30, 1992, and it expects to issue a final decision by the February 16 deadline that will qualify as the basis for state exemption. Indiana Petition at 4.

[15] Missouri Supplemental Filing at 3. Initially, in a request for a declaratory ruling dated February 10, 1993, Missouri petitioned the Commission to declare that state's emergency rule, which was adopted after an abbreviated notice and comment cycle, sufficient to support a waiver of the Commission's requirement that Tier 1 LECs provide physical collocation. The Missouri emergency rule allowed LECs, if they provided collocation, to offer their choice of either physical or virtual collocation on a non-discriminatory basis. Missouri Request for Declaratory Ruling at 1-2. Missouri simultaneously proposed an identical permanent collocation rule to replace the emergency rule. *Id.*

In a subsequent filing, dated April 14, 1993, Missouri stated that it had withdrawn its emergency rule and replaced it with a proposed rule developed by the Missouri staff. The new proposed rule would make expanded interconnection mandatory, extend expanded interconnection requirements to non-Tier 1 LECs, preserve LEC choice on the type of collocation to provide, and incorporate safeguards for both LECs and interconnectors. Missouri states that it published the proposed rule on April 9, 1993, but does not state how long it will take to complete its rulemaking proceeding. Missouri Supplemental Filing at 2-3. As an alternative to its request for an extension of the February 16 deadline, Missouri petitions the Commission to declare Missouri's now-withdrawn emergency rule to be sufficient state action for purposes of meeting the state exemption deadline. *Id.*

[16] Idaho Petition at 2. Idaho states that it initiated an investigation on January 26, 1993 to examine the issue of physical collocation and expects to complete its proceeding on an expedited basis no later than March 26, 1993. *Id.* at 1.

[17] Oklahoma Petition at 1-2. Oklahoma contends that under procedural requirements, the rulemaking is subject to legislative approval, and that late May 1993 is the earliest possible date that such legislative action could occur. *Id.* at 1. Oklahoma further contends that it needs additional time to resolve a disqualification petition that currently precludes a state commissioner from acting on matters involving Southwestern Bell. *Id.* at 1-2.

[18] North Dakota Petition at 2; Florida Petition at 4; California Petition at 1; Illinois Petition at 1; Indiana Petition at 1-2, 5; Missouri Petition at 1-3; Idaho Petition at 2; Oklahoma Petition at 1-2.

Two states argue that mandatory state legislative or administrative procedures make it impossible for them to issue a formal collocation order by the February 16 deadline. Oklahoma Petition at 1; Illinois Petition at 5.

[19] *Id.* at 7. Indiana also notes that it supports NARUC's proposal that the Commission require virtual collocation tariffs to be filed by February 16 and allow physical collocation tariffs to be filed by early 1994. Indiana Petition at 5.

[20] *See, e.g.*, Pacific Bell Reply on NARUC at 1-2; SW Bell Comments on Oklahoma at 2-3; Bell Atlantic Comments on NARUC at 1; Ameritech Comments on Illinois at 5; Alabama Comments on NARUC at 2; Florida Comments on Illinois at 6; Texas Comments on NARUC at 1-2; New Jersey Comments on NARUC at 1-2; Nebraska Comments on NARUC at 1.

arbitrary and capricious because the Commission does not explain why state actions taken before that date do not frustrate federal goals, while state actions taken later would.[21]

7. Several states and NARUC argue that the deadlines established by the *Expanded Interconnection Order* will effectively preempt state regulatory initiatives addressing physical and/or virtual collocation for intrastate expanded interconnection.[22] NARUC contends that effective preemption occurs because once the decision to collocate in one fashion is made, cost considerations effectively eliminate the alternative arrangement.[23] Illinois and Ohio argue that once interconnectors are in the central office, there is no practical way to distinguish between intrastate and interstate services provided through these facilities.[24] California states that, in light of the *Expanded Interconnection Order*, it is concerned that it may no longer have the flexibility to approve intrastate virtual collocation arrangements similar to the one it previously approved between Pacific Bell and Teleport.[25] NARUC also contends at length that if the Commission fails to extend the February 16 deadline, the resulting preemption will have irreparable impacts on state jurisdictions and will deprive the Commission of the benefits of state experimentation.[26]

B. Oppositions

8. Various parties, including interconnectors and interexchange carriers, filed comments or replies opposing one or more of the petitions.[27] These parties express concern that by granting waivers of the February 16 deadline for the LECs to seek a state exemption, the Commission will delay the benefits of physical collocation.[28] MCI contends that extending the deadline for filing would postpone, if not prevent, physical collocation.[29] ALTS, ACLA, AT&T, MFS, and Teleport Denver argue that not adhering to the February 16 deadline would unreasonably delay the implementation of physical collocation for interconnectors, even if virtual collocation were available in the interim.[30] MCI argues that even with a limited extension until March 26, 1993, as in the case of Idaho, the benefits of immediate implementation of physical collocation outweigh a further delay in filing tariffs.[31]

9. In their comments, these parties also point to additional negative consequences of giving the states a greater opportunity to enact virtual collocation policies. MCI argues that by extending the February 16 deadline, the Commission would shift the burden of petitioning for waiver of the physical collocation requirement based on unique circumstances from the LECs and force interconnectors to request tariffed physical collocation service.[32] AT&T argues that, if the Commission grants an extension of the deadline, interconnectors may forego interstate expanded interconnection until proceedings are completed on intrastate collocation architecture. AT&T reasons that interconnectors would avoid the possibility of incurring stranded investment for virtual collocation in the interim, given the possibility that a state may allow physical collocation later.[33] MFS argues that interconnectors that subscribe to interim virtual collocation tariffs may have either to convert at a later date to physical collocation arrangements (with additional costs) or to continue to use inferior virtual collocation arrangements.[34]

10. The opposing parties also disagree with the petitioners' arguments that the Commission has effectively preempted the states, after February 16, from adopting state collocation policies. AT&T, Teleport, and Teleport Denver argue that the Commission has not preempted state interconnection regulation because state regulators will not be precluded from determining intrastate interconnection standards after February 16.[35] AT&T asserts that extension

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[21] NARUC Reply on NARUC at 4; SW Bell Comments on Oklahoma at 4. SW Bell further argues that the Commission's determination that, after the February tariffs are filed, the balance of relevant interests shifts in favor of the interconnectors' expectations is inconsistent with the Commission's conclusion that LECs and interconnectors may be able to negotiate virtual collocation arrangements sufficiently comparable to physical collocation. SW Bell Comments on Oklahoma at 4.

[22] *See, e.g.*, Florida Petition at 4; Illinois Petition at 5-6; NARUC Petition at 9.

[23] NARUC Reply on NARUC at 2.

[24] Illinois Reply on Illinois at 6-7; Ohio Reply on Illinois at 2-3.

[25] California Petition at 2.

[26] NARUC Petition at 9-14. GTE also argues that the Commission should suspend the mandatory physical collocation requirement for all states. GTE Comments on Illinois at 2-3.

[27] *See, e.g.*, ALTS Comments on Illinois at 4; AT&T Comments on Illinois at 4-5; MCI Comments on Illinois at 3; MFS Comments on Illinois at 2-4; Teleport Comments on Illinois at 5; ACLA Comments on NARUC at 2-3; Teleport Denver Comments on NARUC at 1-6; City Signal Comments on Indiana at 2.

[28] A number of parties argue that the petitions are procedurally improper because they are untimely petitions for reconsideration. *See, e.g.*, ALTS Comments on Illinois at 5; MFS Comments on Illinois at 5; ACLA Comments on NARUC at 3. Illinois replies that because there is no statutory deadline by which the Commission must act on the petitions for reconsideration, Illinois acted properly by filing a waiver request. Illinois Reply on Illinois at 7. MCI argues that the Indiana petition is in substance a late-filed comment in support of earlier motions. MCI Comments on Indiana at 2.

Teleport and MFS argue that states should have been able to conclude their interconnection proceedings by the February 16 deadline, because they have had general notice of the possibility of mandatory physical collocation for three years. Teleport Comments on NARUC at 3; MFS Comments on Illinois at 5, n.7.

[29] MCI Comments on Illinois at 3.

[30] ALTS Comments on NARUC at 6-7; ACLA Comments on NARUC at 2-3; AT&T Comments on NARUC/Oklahoma at 7; MFS Comments on NARUC/Oklahoma at 7-8; Teleport Denver Comments on NARUC at 5-6.

[31] MCI Comments on Idaho at 2-3.

[32] MCI Comments on Illinois at 3.

[33] AT&T Comments on Illinois at 7, n.13.

[34] MFS Comments on Illinois at 6. MFS contends that NARUC's arguments in favor of extending the February 16 deadline have to be weighed against the substantial disruption that would occur if NARUC's petition were granted and a state later adopted a physical collocation policy. MFS Comments on NARUC at 7-8.

[35] AT&T Comments on Illinois at 4-5; Teleport Comments on NARUC at 3; Teleport Denver on NARUC at 3-4. AT&T argues that the *Expanded Interconnection Order* found that "the February 16 tariff filing deadline, already 'accommodates the states *to the extent possible*, consistent with our federal policy in favor of physical collocation.'" AT&T Comments on NARUC/Oklahoma at 6 (citing *Expanded Interconnection Order*,

of the deadline is unnecessary to protect state authority over regulation of intrastate expanded interconnection.[36] Teleport Denver argues that, while a dual federal-state regulatory scheme may be inconvenient to administer, an interstate physical collocation standard is not inherently incompatible with an intrastate virtual collocation standard.[37] City Signal contends that even if it is expensive to implement a different form of interconnection for intrastate purposes once interstate physical collocation is in place, there is no preemption.[38]

IV. DISCUSSION

11. After reviewing the record before us, we decline to waive or extend the February 16, 1993 deadline for state action that would qualify as a basis for exemption from our interstate physical collocation requirement. We conclude that extension of this deadline would unnecessarily delay the benefits of physical collocation and is not necessary to preserve legitimate state interests.

12. We believe that the benefits of physical collocation should be realized as soon as possible. Even without allowing additional time for state action, a considerable amount of time, approximately nine months, will elapse between the Commission's adoption of the *Expanded Interconnection Order* and the effective date of the expanded interconnection tariffs. This period is required for LEC preparation and Commission review of expanded interconnection tariffs. In addition, even after the effective date of the tariffs, more time will elapse before the LECs complete preparation of the physically collocated space requested by interconnectors. Further delaying the implementation of physical collocation by allowing additional time for state action would seriously undermine the Commission's goal, as expressed in the *Order*, of promptly providing interconnection on the same terms and conditions as the LECs interconnect their own circuits.[39] We also note that despite the limited time available, five states -- Arkansas, Indiana, Ohio, Maryland, and Wisconsin -- took state action that qualifies as the basis for a state exemption before the February 16 deadline.[40]

13. The *Expanded Interconnection Order* solely governs the collocation architecture for expanded interconnection for interstate special access services, in which the states have a limited interest under our system of dual federal/state regulation. To facilitate coordination with state regulation concerning expanded interconnection, however, the *Order*, through the state exemption, explicitly defers to state regulatory choices adopted as of the February 16 filing date for interstate expanded interconnection tariffs. Although the *Expanded Interconnection Order* may have indirect effects on the states, such effects do not turn legitimate federal regulation of interstate services into preemption of state regulation. The states are free to adopt, or not to adopt, expanded interconnection for intrastate special access. The *Order* does not mandate a particular intrastate collocation architecture before or after the February 16 deadline. Thus, contrary to the arguments of NARUC and several of the states, the *Order* does not preempt state regulation -- with or without the state exemption deadline.

14. Given the importance of implementing physical collocation without further delay, and the limited state interest in the interstate collocation architecture, we conclude that the public interest favors regulatory certainty so that interconnectors can make business decisions concerning the use of expanded interconnection.[41] The Commission never intended the narrowly tailored state exemption provision to be used as a mechanism for delaying the availability of physical collocation for an extended period of time, as proposed by NARUC and a number of individual states. In light of the approximately nine months that have passed since the Commission adopted the *Expanded Interconnection Order*, we cannot grant requests that would result in further delays. We conclude that the limited period the Commission granted the states was reasonable given the overarching need to implement interstate physical collocation in accordance with the Commission's commitment promptly to ensure fair market opportunities for all market participants, including interconnectors.[42]

15. Two states, Oklahoma and Illinois, argue that mandatory state legislative or administrative requirements make it impossible to issue a formal collocation order by the

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7 FCC Rcd at 7391) (emphasis in AT&T comments). Similarly, Teleport Denver argues that the *Order* accommodates intrastate collocation policies. Teleport Denver Comments on NARUC at 4.

[36] AT&T Comments on NARUC/Oklahoma at 1-2. AT&T argues further that interstate special access circuits are jurisdictionally distinct from intrastate special access facilities, and, thus, need not be subject to the same expanded interconnection conditions. AT&T Comments on Illinois at 5.

[37] Teleport Denver Comments on NARUC at 5. ALTS argues that it is possible that states may ultimately elect to require mandatory physical collocation for intrastate traffic. ALTS Comments on NARUC/Oklahoma at 5.

[38] City Signal Comments on Indiana at 3-4.

[39] As we discussed in para. 3, *infra*, the Commission believes that significant benefits will result from increased competition fostered by expanded interconnection through physical collocation.

[40] *Petitions for Exemption from Physical Collocation Requirement*, CC Docket 91-141, *Memorandum Opinion and Order* at para. 28 (released June 9, 1993) (hereinafter *Expanded Interconnection Exemption Order)*. We note that in this Order, we are denying Indiana's request for additional time for state action.

[41] We deny NARUC's request that the Commission require only virtual collocation tariffs to be filed on February 16, and permit physical collocation tariffs to be filed in early 1994 after the completion of pending state proceedings. We also deny California's request that the Commission allow LECs to file temporary tariffs on February 16, 1993, offering either physical collocation or virtual collocation until California adopts a final state policy on collocation, or December 31, 1993, whichever occurs first. We further deny GTE's request that the Commission waive the mandatory physical collocation requirement for all states. The NARUC, California, and GTE proposals each would unreasonably delay the benefits of physical collocation and undermine regulatory certainty.

We reject SW Bell's argument that the Commission's determination that the balance of relevant interests shifts in favor of the interconnectors after the February 16 deadline is inconsistent with the Commission's conclusion that LECs and interconnectors may be able to negotiate virtual collocation arrangements sufficiently comparable to physical collocation. While the Commission permits the LECs and interconnectors to negotiate virtual collocation arrangements, interconnectors still retain the right to physical collocation if they choose. *Expanded Interconnection Order*, 7 FCC Rcd at 7390.

[42] In the *Expanded Interconnection Exemption Order*, we deny Missouri's request that the Commission declare its emergency

deadline. Oklahoma requests that the Commission extend the deadline until late May or early June to allow time for the state legislature to approve its proposed rule, as is required by state law.[43] Illinois requests an extension until November 30, 1993 or longer because state administrative requirements make it impossible for the state to issue a formal collocation order by the February 16 deadline. We conclude that the balance that the Commission struck in the *Expanded Interconnection Order* in favor of regulatory certainty after the February 16 deadline and the Commission policy in favor of prompt implementation of physical collocation, as we stated above, requires denial of the requests for extension, even in such cases. We believe that additional delays in interstate physical collocation designed to satisfy state procedural requirements would be contrary to the public interest in light of the limited state interest in the interstate collocation architecture.[44]

V. CONCLUSION

16. For the reasons discussed above, we deny the NARUC and state petitions requesting an extension, or waiver of, the February 16, 1993 deadline for state action qualifying as the basis for exemption from the requirement for the filing of interstate physical collocation tariffs. We conclude that the limited state interest in the architecture for interstate expanded interconnection does not warrant delaying the offering of physical collocation so as to allow the states to reach decisions on intrastate collocation policies after the deadline.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that all requests for additional time for state action listed in Appendix A of this Order, with the exception of the Idaho petition, are DENIED, as discussed above.

18. IT IS FURTHER ORDERED that the request by Idaho to withdraw its petition for waiver IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

APPENDIX A

Parties Filing Petitions for Waiver, Comments/Oppositions, and Replies

Petitions for Waiver or Deadline Modification

California Public Utilities Commission (California)

Florida Public Service Commission (Florida)

Idaho Public Utilities Commission (Idaho)

Illinois Commerce Commission (Illinois)

Indiana Utility Regulatory Commission (Indiana)

Missouri Public Service Commission (Missouri)

National Association of Regulatory Utility Commissioners (NARUC)

North Dakota Public Service Commission (North Dakota)

Oklahoma Corporation Commission (Oklahoma)

Comments and Replies on Illinois Petition

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Association for Local Telecommunications Services (ALTS)

California PUC

Central Telephone Company (Centel)

GTE Service Corporation (GTE)

Illinois

MCI Telecommunications Corporation (MCI)

MFS Communications Company, Inc. (MFS)

NARUC

New Mexico State Corporation Commission (New Mexico)

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rule on collocation to be sufficient state action for purposes of meeting the February 16 deadline. *Expanded Interconnection Exemption Order* at para. 43. The emergency rule does not satisfy the requirements established in the *Expanded Interconnection Order*. While we are denying Missouri's request for additional time to take further action that would qualify as the basis for the state exemption, we recognize the progressive work of the Missouri staff on their new proposal, which would replace the emergency rule.

[43] Oklahoma does not state when it initiated its intrastate expanded interconnection proceeding. We note that the Oklahoma Corporation Commission acted by the February 16 deadline, although, in a separate order, we conclude that its action does not satisfy Commission requirements for grant of a state exemption. *Expanded Interconnection Exemption Order* at para. 56.

[44] In this Order, we grant Idaho's request to withdraw its petition asking that the Commission extend the deadline for state action qualifying as the basis for an exemption to March 26, 1993. *See* Withdrawal of the Idaho Public Utilities Commission's Request for Limited Waiver for Final State Action, June 2, 1993.

Ohio Public Utilities Commission (Ohio)
Teleport Communications Group (Teleport)

Comments and Replies on Oklahoma and NARUC Petitions

Alabama Public Service Commission (Alabama)
AT&T
Ameritech
ALTS
Associated Communications of Los Angeles, Inc. (ACLA)
Bell Atlantic Telephone Companies (Bell Atlantic)
California
Florida
GTE
Kansas City Cable Partners (Kansas City FiberNet)
MCI
MFS
Missouri
Nebraska Public Service Commission (Nebraska)
New Jersey Board of Regulatory Commissioners (New Jersey)
New Mexico Pacific Bell and Nevada Bell (Pacific Bell)
South Carolina Public Service Commission (South Carolina)
Southwestern Bell Telephone Company (SW Bell)
Teleport
Teleport Denver Limited (Teleport Denver)
Texas Public Utility Commission (Texas)
Virginia State Corporation Commission (Virginia)

Comments on Indiana Petition

Ameritech
ALTS
AT&T
City Signal, Inc. and Indiana Digital Access (City Signal)
MCI
MFS
Teleport
United Telephone Systems Companies (United)

Comments and Replies on Idaho Petition

ALTS
AT&T
Idaho
MCI
MFS
U S West

Note: The remaining petitions, North Dakota, Florida, California, and Missouri, were not placed on public notice with a comment cycle.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 11, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S AMENDMENT TO ITS COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR VOICE MESSAGING SERVICES

On June 1, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed an amendment to its comparably efficient interconnection (CEI) plan for voice messaging services (VMS), 3 FCC Rcd 7284 (1988). BellSouth proposes to amend the VMS plan to add two new enhanced services. BellSouth states that the new services will allow customers to receive informational messages on either a subscription or a per-call basis and to receive information through a "voice-grade facsimile capability" associated with the voice store-and-forward equipment.

Pursuant to the *Computer III* requirements, as reinstated in the *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991), the Commission must approve this CEI amendment before BellSouth begins providing the new services.

BellSouth states that it will offer customers an opportunity to receive, on a subscription or per-call basis, informational messages on a wide variety of topics, including news, sports, business, weather, stocks, entertainment, real estate, health, horoscopes, and restaurants. BellSouth adds that the feature may also be used to provide voice messaging subscribers with informational messages tailored to their specific interests and needs. BellSouth states that the voice-grade facsimile feature will allow customers to receive additional information from any facsimile device, to re-direct facsimile messages to other parties, and to store, retrieve, review, and delete messages received in facsimile format. BellSouth also states that it will not use any new or changed network services to offer these features. In its filing, BellSouth states that it will continue to comply fully with all of the regulatory requirements of its CEI plan.

Interested parties should file comments on this amendment by **June 28, 1993,** and reply comments by **July 8, 1993,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of BellSouth's amendment can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling
And Related Waivers to Establish
A New Regulatory Model for the
Ameritech Region

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief,
Policy and Program Planning Division

ORDER

Adopted: June 10, 1993; Released: June 10, 1993

By the Chief, Policy and Program Planning Division:

1. On March 1, 1993, Ameritech filed a petition with the Commission seeking a declaratory ruling and related waivers to establish a new regulatory model designed specifically for its five-state region. The Commission requested comment on the Petition by June 11, 1993, and reply comment by July 12, 1993.[1]

2. In response to Ameritech's petition, on June 2, 1993, the Michigan Public Service Commission (MPSC) filed a motion with the Commission. In its motion, MPSC requests that the Commission compel Ameritech to respond to interrogatories that MPSC served on Ameritech on May 14, 1993.

3. On June 8, 1993, Ameritech filed a response to MPSC's motion, requesting that the Commission deny MPSC's motion.[2] In its response, Ameritech states that it intends to work with the staff representatives of the state regulatory commissions in its region in order to address the issues raised in the interrogatories prior to the formal filing of Ameritech's reply comments.

4. The Ameritech petition presents very important issues, and it is critical that the Commission obtain a complete record in this proceeding. The Commission's rules, however, do not provide for interrogatories in response to a petition for declaratory ruling or waiver. *See* generally, Part 1 of the Commission's Rules, Practice and Procedure, 47 C.F.R. 1. Ameritech has proposed an informal arrangement for responding to MPSC's interrogatories. We believe that such an arrangement would be beneficial to all parties.

5. ACCORDINGLY, IT IS ORDERED, that MPSC's Motion to Compel shall be treated as a comment in this proceeding.[3]

[1] *See* Public Notice on Ameritech's Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, 8 FCC Rcd 2964.

[2] *See* Letter to Donna R. Searcy, Secretary, FCC, from Larry Peck, Attorney for the Ameritech Operating Companies, dated June 8, 1993.

[3] MPSC also requests that the Commission extend the deadlines for the filing of comments and replies until 28 days after MPSC receives a full answer to interrogatories. We decline to address this request because the request for extension of time is contingent on the grant of the motion to compel, and that motion has not been granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Micronesian Telecommunications Corporation Revisions to Tariff F.C.C. No. 1 — Transmittal No. 85

ORDER

Adopted: June 14, 1993; Released: June 14, 1993

By the Chief, Tariff Division:

1. On May 18, 1993, Micronesian Telecommunications Corporation (MTC) filed the captioned tariff revisions which are scheduled to become effective July 2, 1993. Transmittal 85 establishes no new rates; rather, it introduces the Mechanized Calling Card Service (MCCS) available at specific locations as a non-chargeable option at existing, direct-dial rates.[1]

2. On May 24, 1993, IT&E Overseas, Inc. (IT&E) filed a petition to reject Transmittal 85; MTC replied on June 1, 1993.[2] IT&E contends that Transmittal 85 was improperly filed as a non-dominant carrier filing and without the cost support required of dominant carriers. IT&E states that MTC's integration of exchange and interexchange operations makes it a dominant carrier under the terms of several domestic competitive carrier decisions. IT&E Petition at 3-6.[3] IT&E further argues that MTC is also a dominant carrier under the *International Competitive Carrier Order*,[4] but that even if MTC were viewed as non-dominant under that decision, its non-dominant status would apply only to truly international traffic. IT&E then argues that the traffic affected by the transmittal is domestic rather than international. *Id.* at 7-11.

3. MTC replies that its tariff offers primarily International Message Telephone Service (IMTS) between the Commonwealth of Northern Marianas Islands (CNMI) and international points, as well as to the mainland and offshore points, but that all such service is provided over international facilities and utilizes the international dialing code. As to IMTS, MTC avers, it is non-dominant because the *International Competitive Carrier Order* did not include MTC on the list of dominant carriers and unlisted carriers were deemed non-dominant. In addition, MTC asserts that since service to offshore points is authorized by the Commission's International Facilities Division and traffic to and from them is treated as international for reporting purposes, treating them in the same manner as international services for tariffing purposes is reasonable. Finally, MTC contends that review or revision of its regulatory status requires a rulemaking, and that as a non-dominant international carrier, it is not required by Section 61.38 to provide any supporting material for its tariff. *Id.* at 2-4.

4. The Tariff Division has reviewed Micronesia Telecommunications Corporation Transmittal No. 85, IT&E's petition, and MTC's reply. We conclude that the transmittal is not so patently unlawful as to require rejection and that no investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that MTC's motion to strike the petition filed by IT&E IS DENIED.

6. IT IS FURTHER ORDERED that the petition to reject Micronesian Telecommunications Corporation Transmittal No. 85, filed by IT&E Overseas, Inc., IS DENIED.

7. IT IS FURTHER ORDERED that Application No. 30, filed June 7, 1993 by Micronesian Telecommunications Corporation, IS GRANTED. Sections 61.56 and 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived for the purpose of advancing the effective date of the captioned transmittal on not less than one day's notice and Special Permission No. 93-485 is assigned for that purpose.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On June 7, 1993, MTC filed an application for special permission to advance the effective date of the transmittal. MTC Application No. 30 (Waiver of §§ 61.56 and 61.58), June 7, 1993.

[2] MTC also filed a motion to strike the IT&E petition, arguing that IT&E failed to serve MTC personally or by facsimile as required by recently amended Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773. *See* Amendment of Section 1.773 of the Commission's Rules Regarding Pleading Cycle for Petitions Against Tariff Filings Made on 14 Days' Notice, Report and Order, Docket No. 92-117, 58 Fed. Reg. 17528 (Apr. 5, 1993) (effective May 6, 1993, pleading cycle for petitions against 14 day filings shortened from seven to six days). *See also* Public Notice, Tariff Filings Made on 14 Days' Notice, DA 93-608, May 28, 1993. In light of the recent change in our rules and the fact that MTC was not prejudiced by IT&E's non-compliance, we deny MTC's motion.

[3] *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fifth Report and Order, 98 FCC 2d 1191 (1984).

[4] International Competitive Carrier Policies (Report and Order), CC Docket No. 85-107, 102 F.C.C. 2d 812 (1985) (*International Competitive Carrier Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	**MM Docket No. 92-259**
Broadcast Signal Carriage Issues	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	**MM Docket No. 90-4**
Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	**MM Docket No. 92-295** RM-8016

CLARIFICATION ORDER

Adopted: May 28, 1993; **Released: May 28, 1993**

By the Commission:

1. On March 11, 1993, the Commission adopted a *Report and Order* [1] in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] Under the rules adopted in the *Report and Order*, by May 3, 1993, cable operators were required to notify any local broadcast television station that may not be entitled to must-carry status because: (1) it fails to deliver a good quality signal to its cable system's principal headend; or (2) carriage of such signal would be considered distant for copyright purposes and the cable operator would incur a copyright liability for carriage of such signal. The purpose of this notice was to permit broadcast stations to consider their options regarding their must-carry rights prior to June 2, 1993, when cable operators are required to begin carriage of their complement of commercial must-carry signals and the June 17, 1993, election of must-carry or retransmission consent by such television stations.

2. In a jointly-filed May 13, 1993, Request for Declaratory Ruling, the Association of Independent Television Stations, Inc. and the National Association of Broadcasters ("INTV and NAB" or "petitioners") seek clarification regarding the obligation of cable systems to provide information to broadcast stations relating to the May 3, 1993, notification. InterMedia Partners, L.P. ("InterMedia"),[3] the National Cable Television Association ("NCTA"),[4] and Cablevision Systems Corporation ("Cablevision") responded to this request.[5] By this *Clarification Order* ("Clarification"), we consider each of the specific issues raised by INTV and NAB concerning good signal quality, copyright indemnification and translator ownership separately.

3. At the outset, however, we wish to address an overriding concern of the petitioners that cable operators are delaying discussions with broadcast stations under the assumption that, if they do not resolve these signal quality or copyright issues prior to the June 2, 1993, implementation date, then they will be relieved of their obligations to carry such broadcast signals for the entire three year period designated in the 1992 Act. We clarify that a local broadcast station does not forfeit its must-carry rights, if signal quality or copyright disputes are not resolved by that date. In addition, where the station does not initially meet the criteria for must-carry status, it subsequently may assert its rights once it satisfies the conditions for must-carry status.[6]

4. *Good Quality Signal.* INTV and NAB are concerned that the May 3, 1993, notices did not provide the specific information required by the Commission.[7] They believe that, if a cable operator failed to include such information, it should be required to provide the information immediately upon request by a television station. The petitioners further ask the Commission to declare that failure to do so should render the initial notice invalid and permit stations to assert and enforce must-carry and channel positioning rights. NCTA and InterMedia do not disagree that cable operators must provide the detailed information regarding their signal quality tests. InterMedia further proposes that a cable operator that fails to provide this information promptly should lose the benefit of the inadequate signal notice.

5. We acknowledge that there was some confusion between the rules and the text of the *Report and Order* regarding the detail required in this initial notice.[8] The

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[1] *Report and Order* in MM Docket No. 92-259, 58 FR 17350 (April 2, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] On May 18, 1993, InterMedia submitted comments on the Request for Declaratory Ruling. InterMedia argues that it should have the right to respond to allegations made by INTV and NAB in their petition against its cable operations. It also comments on specific points raised in the request for clarification.

[4] NCTA filed an opposition to the Request for Declaratory Ruling on May 19, 1993. In addition to addressing specific issues raised by INTV and NAB, NCTA asserts that the documentation submitted by the petitioners does not support their generalization that cable operators are trying to obstruct the process of implementing the new must-carry rules. It also contends that some of these issues should be resolved in a rulemaking proceeding.

[5] In its May 20, 1993, Opposition to Request for Declaratory Ruling, Cablevision refutes what it claims are unproved allegations in the petition that it is using delaying tactics to avoid carrying television station WLIG on its cable systems.

[6] However, if a television station asserts its must-carry rights and is denied carriage or its requested channel position, it is subject to time limits established for filing complaints. *See* 47 C.F.R. § 76.61.

[7] *See Report and Order* at para. at 103.

[8] *See* 47 C.F.R. § 76.58(d). *See also Report and Order* at paras. 31, 102-103.

intent of the May 3, 1993, notice was to inform broadcast stations that they may need to resolve a signal delivery or copyright liability problem in order to retain their must-carry rights before June 2, the date on which cable systems must comply with the rules regarding must-carry obligations. Thus, we expect cable operators to cooperate fully with broadcast stations so that they are not deprived of the statutorily mandated must-carry rights to which they are entitled. Accordingly, cable operators must provide broadcast licensees with the relevant information promptly. In particular, the cable operator must provide a detailed description of the reception and over-the-air signal processing equipment used, including sketches and a description of the methodology used by the cable operator for processing the signal at issue. This information must include the specific make and model numbers and age of all equipment.[9] In addition, if a cable operator provides measurements of signal levels in any form other than that specified in the 1992 Act (*i.e.*, -45 dBm for VHF signals and -49 dBm for UHF signals), then it must provide the appropriate conversion formulas. Since any notice that a station does not deliver a good quality signal should reflect measurements made at the cable system's principal headend, we believe that the measurement results and the system's technical specifications should be readily available. Therefore, we expect cable operators to respond to a request for such measurement information within 3 business days of the request. A cable operator that fails to comply with the rules relating to this notification requirement may be subject to sanctions by the Commission. In addition, any future notices to broadcast stations regarding their failure to deliver a good quality signal shall include the detailed information specified in the *Report and Order*.

6. INTV and NAB contend that, when measuring signal strength, a cable operator should use the same antenna and receiving equipment normally used by the cable system to receive and process broadcast signals currently carried. The cable operator should take these measurements at its designated principal headend and should use an antenna placed at the same height as that currently used by the cable system to receive broadcast signals.

7. InterMedia disagrees with this position because the Commission has traditionally used free space reception by standard antennas at normal roof top levels to measure the availability of broadcast signals. If such standard test procedures do not indicate an adequate signal strength, then the cable operator should be able to choose to use a non-standard antenna for the measurements, according to InterMedia. It also states that if the special antenna supports must-carry, then the broadcaster bears the responsibility to pay for the initial purchase, installation and maintenance of the antenna and a fair share of the maintenance or required upgrading of the supporting tower. Intermedia further asserts that non-employees cannot be permitted to climb its towers to measure signal strength due to limitations in its insurance policies. NCTA states that INTV and NAB appear to object to the use of "inexpensive and non-professional antennas" instead of the antennas normally used to receive local television signals. NCTA asserts that the rules do not require the use of any specific antennas nor do they mandate that the measurement be taken at a particular elevation. Moreover, it states that, even if a measurement is taken at a lower height than the system's regular receiving equipment, those measurements can be correlated to the signal strength at a higher elevation.

8. As the statute specifies that a broadcast station must deliver a good quality signal to the principal headend of the cable system to be entitled to must-carry rights,[10] we clarify that the designated principal headend is the appropriate location for such measurements. For broadcast stations currently received at the designated principal headend and currently carried on the cable system, the signal quality measurements required by the 1992 Act should be made using the equipment now used by the cable operator to receive such signals. For broadcast stations not currently carried on the cable system, to the extent that the cable operator is able to do so, the signal level shall be determined based on measurements made with generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend.[11] Where such similarities do not exist or if the measurements were made at a designated headend that is not the current reception location (headend) for the broadcast signals, we expect the cable operator to follow good engineering practices for the measurement of the broadcast signals in question.

9. INTV and NAB state that engineers from the cable system and broadcast station should meet promptly to resolve any matters regarding inadequate signal strength and that both parties should use their best efforts to resolve signal quality problems. We note that InterMedia agrees with this approach. We believe that this statement accurately reflects the Commission's intent and decision in the *Report and Order*.[12] It is also consistent with the clarification of the requirement that cable operators respond promptly to inquiries from affected broadcast stations.[13] Where the parties cannot reach agreement, however, either the broadcaster or the cable operator may seek a Commission ruling on the validity of the must-carry claim.

10. The petitioners seek clarification that, if adequate signal quality can be achieved through the use of a higher gain or "notched" antenna, then cable operators should be required to use such an antenna supplied by the broadcaster. They argue that cable operators should not be permitted to refuse to use equipment made available to them. NCTA states that neither the *Report and Order* nor the rules require cable operators to use higher gain or "notched" antennas and that for purposes of making the required measurements cable operators should not be required to invest in such equipment. InterMedia believes that, with respect to existing antenna, the broadcaster should be responsible for the maintenance of specialty antennas and a fair share of the maintenance of the supporting structure. InterMedia states that it would permit a station to provide new or special antennas for the test of its signal strength, although due to insurance considerations it is unwilling to allow non-employees to climb its towers. If

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[9] *See Report and Order* at para. 103.

[10] *See* Section 614(h)(1)(B)(iii). *See* 47 C.F.R. § 76.55(c)(3).

[11] However, cable operators need not employ extraordinary measures or specialized equipment when making measurements for stations that are not currently carried.

[12] *See Report and Order* at paras. 97, 103.

[13] *See* para. 5, *supra*.

such an antenna proves useful, InterMedia contends that the broadcaster should be responsible for any costs associated with required modifications to its facilities (*e.g.*, changes to the supporting structure or consultations with professional engineers).

11. In the *Report and Order*, the Commission clearly stated that improved antennas are among the types of equipment that the broadcaster may provide to deliver a good quality signal.[14] A cable operator's refusal to permit a broadcaster to provide this necessary equipment, either to make test measurements or for the continued delivery of the signal, clearly interferes with a broadcaster's statutorily mandated must-carry rights and the Commission will take whatever remedial action deemed appropriate in such cases. Broadcasters shall be responsible for the cost of such specialized antennas or equipment. However, cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking must-carry status. Accordingly, we believe that it is appropriate to require a broadcast station to pay only for antennas, equipment and other needed improvements that are directly related to the delivery of its signal and not to contribute to the general maintenance of the cable system's facilities.

12. INTV and NAB argue that, where the cable operator is currently carrying a television station, it should be required to continue to carry the station while signal quality disputes are being resolved. In addition, they state that the station should be permitted to assert its channel positioning rights on June 17, 1993. NCTA rejects the proposal to require continued carriage until such disputes are resolved because this approach will likely prolong disputes. InterMedia opposes the request to permit a television station that has not resolved its signal delivery problems to elect its channel position on June 17 since channel positioning is at the discretion of the cable operator until October 6 and this matter can be considered in the context of resolution of other issues.

13. We believe that it is unlikely that a signal that is currently carried by a cable system does not deliver a good quality signal to the principal headend. Thus, we believe that few questions will be raised regarding the continued carriage of such stations under the cable system's June 2, 1993, must-carry obligations. Moreover, we note that NCTA urged the Commission to avoid unnecessary line-up changes in its request to stay the effective date of the must-carry rules.[15] Dropping broadcast signals while disputes are being resolved would lead to greater uncertainty among subscribers. Finally, as indicated above, the local broadcast station does not lose its rights even if it does not satisfy the conditions for must-carry status on June 2 or June 17, 1993. While a broadcast station that plans to bear the cost of establishing or maintaining its must-carry status may elect a channel position on June 17 in anticipation of resolving any problems, it may also make that request when it corrects any problem associated with its signal delivery (or copyright status), thereby attaining must-carry status.

14. The final signal quality clarification sought by INTV and NAB is that a television station that agrees to make signal quality improvements should be entitled to must-carry status on the date the signal is provided to the cable system. In particular, petitioners ask the Commission to state that stations unable to rectify signal problems by June 2, 1993, do not lose their carriage or channel positioning rights for the initial three year period. InterMedia argues that a broadcast station should not have an unlimited period to fulfill its obligations to meet the must-carry criteria. It proposes that a station should make the equipment available within 90 days or lose its must-carry status for the remainder of the three year election period. NCTA does not dispute the contention that a station is entitled to must-carry status when it is able to deliver a good quality signal. However, it states that it may not be feasible to begin carriage of the signal on the date it can be delivered to the cable system because channel line-ups may need to be changed and franchise authorities and subscribers must be notified.

15. We reiterate our clarification that broadcast stations may assert their carriage and channel positioning rights at any time, so long as they have not elected retransmission consent. In particular, we note that a broadcast station's ability to deliver a good quality signal may depend on factors that it cannot control (*e.g.*, when a supplier can provide the needed equipment). Therefore, a time limit on the exercise of must-carry rights is not only contrary to the 1992 Act and our rules, but is unrealistic. However, we do not believe that a cable operator can be expected to comply with a must-carry station's request for carriage or channel positioning on the first date the station delivers to the system's principal headend a signal that meets the criteria for must-carry status. Our rules require cable operators to provide notice of changes in their channel line-ups to subscribers and affected stations.[16] Thus, we believe that it is appropriate to give cable operators up to 45 days to begin carriage of such station on its requested channel in order to allow the operator time to comply with these notification requirements.[17]

16. *Copyright Indemnification.* With respect to the notices received by broadcast television stations regarding copyright indemnification, INTV and NAB state that cable systems should be required to respond promptly to a written request for the necessary information. We concur and, consistent with our requirements for cable system responses to matters relating to signal quality, we expect a cable operator to provide such information within 3 business days of receipt of the request. Clearly, any cable operator that sent a notice to a broadcast station that it would lose its must-carry rights because of copyright liability should have relevant information readily available.

17. Specifically, INTV and NAB state that for stations currently carried by a cable system, a cable operator should provide the station with its most recent form filed with the Copyright Office, detailing the payment made for carriage of the given station. The cable operator also should provide the number of distant signals previously carried by the system and the order in which such signals were carried. Furthermore, INTV and NAB contend that the cable operator should provide a good faith estimate of the potential copyright liability for the next accounting period (July 1 - December 31, 1993) that is associated with carrying the

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[14] *See Report and Order* at para. 104.

[15] *See Order* in MM Docket No. 92-259, FCC 93-278, released May 27, 1993.

[16] *See* 47 C.F.R. §§ 76.58(a) and 76.309(c)(3)(A)(2).

[17] The Commission provided a similar time period for cable operators to comply with an order issued in response to a must-carry complaint. *See* 47 C.F.R. § 76.61(a)(4).

station. For stations not carried by the cable system prior to April 2, 1993, INTV and NAB would require the cable operator to provide the broadcast station with a good faith estimate of the potential copyright liability for carriage of the station during the next copyright accounting period. In addition, the petitioners assert that the station should receive a copy of the most recent form filed with the Copyright Office for existing distant signal carriage that details the payments made for carriage of distant signals.

18. NCTA states that the information sought by INTV and NAB are not required by the rules, although the *Report and Order* indicates that the cable operator should provide an estimate of the expected copyright liability. [18] Alternatively, InterMedia asserts that making the latest Statement of Account available is a reasonable requirement. However, NCTA and InterMedia argue that some information, such as the order of carriage, is not always readily available and the broadcaster has the same access to sources of such information as the cable operator (*e.g., Television Factbooks* or earlier copyright filings). Moreover, InterMedia states that the broadcast station can make its own calculations of potential copyright liability based on the reported revenues and signal complements on the most recent Statement of Account.

19. In the *Report and Order*, the Commission determined that it is appropriate to require a cable operator to provide the broadcaster with an estimate of the expected copyright liability. We do not believe that such responsibility should be shifted to the broadcaster, even if the cable operator must use publicly-available documents in lieu of its own records. Furthermore, we believe that the types of information specified by INTV and NAB are consistent with this requirement. Thus, we clarify that, at a minimum, a cable operator should provide the information described here to a broadcast station that may be required to pay for copyright indemnification to retain its must-carry status. The cable operator, however, is not required to make legal judgments pertaining to the amount of indemnity involved.

20. INTV and NAB also seek a requirement that cable operators be required to carry broadcast stations for which they incur copyright liability, if they fail to provide the required information. In such instances, the petitioners argue that stations should not be required to indemnify cable operators until such information is received. InterMedia objects to this requirement and observes that to hold the cable operator liable for such copyright fees is contrary to the 1992 Act. We concur with InterMedia. Under the 1992 Act, a cable operator is not required to carry a station for which it incurs copyright liability.[19] Thus, to clarify the rules in this manner requested by INTV and NAB would go beyond the Commission's authority. However, we do have the authority to take appropriate action against cable operators that do not comply with our rules. Therefore, any cable operator not providing sufficient information to a broadcast station regarding potential copyright liability in the required timely fashion may be subject to Commission sanctions.

21. *Translator Ownership.* INTV and NAB indicate that a question has arisen regarding the use of translators owned by parties other than the broadcast station with must-carry rights to deliver its television signal to the system's principal headend. Petitioners observe that the *Report and Order* does not require that the broadcast station own the translator used to deliver its signal. InterMedia also states that independent ownership of a translator should not bar its use for delivery of a good quality signal. However, InterMedia is concerned that some translators, which are owned by non-profit community organizations with limited resources, deliver signals of poor or inconsistent quality. It believes that a cable operator should be entitled to a commitment from a broadcast station that it will provide the resources needed to maintain such translators in good working order.

22. We do not believe that the ownership of the translator is relevant to the matter of delivery of a good quality signal for must-carry purposes. It was our intent to provide another option for broadcast stations to meet the criteria for must-carry status. Thus, we grant the clarification sought by INTV and NAB in this regard. However, we also concur with InterMedia that the signal delivered by a translator must consistently provide a signal meeting the criteria set forth in the statute and our rules. Therefore, where necessary, a broadcast station will be required to bear the cost of maintaining the signal delivery at the specified level by the translator to retain its must-carry status.

23. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 303(r), that the Request for Declaratory Ruling filed jointly by the National Association of Broadcasters and the Association of Independent Television Stations, Inc., IS GRANTED to the extent specified in this Clarification Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[18] *Report and Order* at para. 114.

[19] *See* Section 614(h)(1)(B)(ii). However, a cable operator may not demand advance payment of estimated copyright fees as a condition for broadcasts to retain must-carry rights.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

PORTLAND CELLULAR PARTNERSHIP — File No. 27414-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P. — File No. 27488-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1993; Released: June 4, 1993

By the Commission:

I. INTRODUCTION

1. Community Service Telephone Co. (Community) has filed a petition for reconsideration of the Commission's decision in *Portland Cellular Partnership*, 6 FCC Rcd 2283((1991), (hereinafter *Port Cell Remand Order*). Community has also filed an application for review[1] of the Common Carrier Bureau's decision declaring Northeast Cellular Telephone, L.P. (Northeast) the first ranked applicant and tentative selectee for the Portland Maine Block B cellular market. This Order will address the arguments raised by Community in its petitions. We will also address two separate petitions to dismiss or deny the application of Northeast filed by Portland Cellular Partnership (Port Cell)[2] and Saco River Cellular, Inc. (Saco River).[3] Oppositions and responsive pleadings have been filed by the parties to this proceeding. For the reasons set forth below, we affirm the *Port Cell Remand Order* and grant Northeast's application.[4] Community has failed to demonstrate any Commission error upon which relief may be granted.[5]

II. BACKGROUND

2. The application of Seacoast was selected first in the lottery for the Portland, Maine cellular radio market. The application of Seacoast was substituted with the application of Port Cell pursuant to a pre-lottery partial settlement. The Mobile Services Division (MSD) found the substituted application acceptable and granted an authorization to Port Cell.[6] This grant was affirmed by the Commission.[7] North-

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[1] Community's application for review incorporates its petition for reconsideration and is directly related to review of the decision naming Northeast as the tentative selectee announced in Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991). While the naming of an entity as a tentative selectee is not an "action" subject to Commission review under 47 U.S.C. § 305(c) and 47 C.F.R. § 1.15, in order to resolve all pending matters in this complex case, we will address Community's arguments. Moreover, because the arguments in the petition for reconsideration and the application for review are identical, we will refer to both as Community's "petition."

[2] At the time of the grant, Port Cell consisted of Seacoast Cellular, Inc. (Seacoast) (42 percent interest), NYNEX Mobile Communications Company (NYNEX) (48 percent interest) and Community Services Telephone Company (10 percent interest). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

[3] Port Cell also submitted a "Motion for Leave to File Response" to the Consolidated Reply of Northeast and Northeast submitted an opposition to Port Cell's pleading.

[4] On April 29, 1992, Port Cell filed a Petition for Reconsideration and Reinstatement of License, to which Northeast filed an Opposition. Port Cell filed its reconsideration petition nearly a year after the 30-day deadline for such petitions set forth in Section 405 of the Communications Act. 47 U.S.C. § 405. As we have repeatedly noted, "except where the Commission fails to provide notice of its decision to parties as required by its rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405." Heritage Cablevision Associates of Dallas, L.P., 7 FCC Rcd 4192, 4193 (1992) (subsequent history omitted). *See also id.* at 4194 n.15 for additional case references. Accordingly, we dismiss Port Cell's untimely petition for reconsideration. Additionally, on March 31, 1993, Port Cell filed a letter with the Chairman which raised the same matters raised in its late-filed Petition for Reconsideration. Northeast filed a response to this letter. This letter is simply a supplement to a late-filed petition for reconsideration and is therefore not considered herein.

[5] Section 1.106(d) of the Commission's Rules sets forth the requirements of a petition for reconsideration. While Community has attempted to cite the conclusions which it believes to be erroneous, it has not persuaded us that there is any error in the *Port Cell Remand Order*.

[6] *See* Portland Cellular Partnership, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987). In finding Port Cell qualified, the MSD also denied requests for waiver of Section 22.921 of the Commission's Rules. Seacoast and Community filed waiver requests because common shareholders between them own more than one percent of the stock in each. In their request, Seacoast and Community requested alternative relief that Community's application be dismissed and only Seacoast's application be considered in the lottery. In a letter dated May 27, 1986, the MSD stated that it was in the public interest to include both applications in the lottery and consider the requests for waiver after the lottery if Seacoast or Community were selected. *Id.* at 5587. The MSD further stated that if Community's application were selected first it would consider the second-ranked applicant as the tentative selectee in the market, thereby essentially granting the alternative relief sought by the parties. In its Order granting Port Cell, the MSD stated that because Community's application

east and Saco River appealed the Commission's decision to the United States Court of Appeals for the D.C. Circuit. The Court vacated and remanded the Commission's Order[8] agreeing with the petitioners that the Commission's decision to waive the financial requirements was not consistent with *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (WAIT Radio).[9]

3. Accordingly, in the *Port Cell Remand Order*, the Commission vacated its grant and dismissed the Port Cell application; dismissed the application of Seacoast as amended to substitute Port Cell as the applicant; and granted Port Cell interim authority to provide service until the grant of a new construction permit. As the next ranked applicant, Saco River would have become the tentative selectee.[10] However, a review of its application revealed that Saco River proposed a 39 dBu contour extension into the adjacent Lewiston-Auburn New England County Metropolitan Area (NECMA) that was not *de minimis* and therefore prohibited. Thus, the Saco River application was found defective and was dismissed. Northeast, the next ranked applicant, was announced the tentative selectee for the Portland cellular market in a separate public notice. *See* Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991).[11]

III. PLEADINGS; DISCUSSION

A. Pleadings

1. Community's Petition

4. In its application for review and petition for reconsideration, Community makes three main arguments. First, it argues that the Commission erred in not upholding the grant of Port Cell's application. According to Community, the court remanded the Commission's grant to Port Cell on the narrow ground that the Commission failed to articulate adequately both the basis and the standard for granting a waiver of strict compliance with the financial qualifications rules. Community contends that on remand it was incumbent upon the Commission to review the record to determine whether Port Cell was financially qualified.

5. Second, Community maintains that the Commission erred in not allowing it to remain ranked among the lottery winners. In Community's view, the Commission ignored the statement that its voluntary dismissal of its application was conditioned upon the grant of the permit to Port Cell. Indeed, Community states that settlements will be much harder to achieve if the settling parties cannot reasonably escape the settlement when the settlement application is not acceptable to the Commission. It is unfair, Community asserts, to penalize two applicants who properly filed applications, reached a partial settlement encouraged by the Commission, and invested time and resources into building and operating a successful cellular system.

6. Third, Community requests reconsideration of the MSD's earlier denial of its request for a waiver of Section 22.921.[12] Community and Seacoast requested waivers in their applications because they had two common shareholders who owned more than 1 percent of the stock in each.[13] Community states that the purpose of the rule is to prevent the filing of multiple applications by commonly controlled corporations, thus promoting administrative efficiency and minimizing the possibility that any applicant may have a substantial interest in more than one application for a cellular license. However, Community argues, it is not commonly controlled by one or more corporations, and no party will have a substantial interest in more than one applicant for the license. Thus, Community asks the Commission to revisit the MSD's decision and grant its waiver request.

7. In its opposition to Community's petition for reconsideration, Northeast asserts that most of the arguments presented by Community were addressed in other pleadings in this proceeding.[14] In light of the opinion of the court, Northeast contends that the Commission cannot now find Port Cell financially qualified. It maintains that Community cannot now challenge the 1987 MSD decision which found Community ineligible to participate in the lottery, because it should have asserted this challenge immediately

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was not selected first it did not have to be formally dismissed and that Seacoast's application was properly accepted as the tentative selectee.

> The MSD Order also found Port Cell financially qualified despite the fact that the letter of credit from NYNEX Credit Company (NCC) failed to contain the terms of the loan commitment and did not make an assessment as to the creditworthiness of Port Cell as required by the Commission's Rules. The MSD determined that NCC fulfilled the Commission's requirements in a subsequent letter.

[7] Portland Cellular Partnership, 4 FCC Rcd 2050 (1989).

[8] Northeast Cellular Telephone Company, L.P. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[9] Port Cell's petition for rehearing was denied on May 9, 1990.

[10] The application of Seacoast Cellular was chosen as the first ranked applicant in the Portland, Maine, lottery followed by Saco River, Community, Northeast, and NYNEX. Seacoast, Community, and NYNEX entered into a pre-lottery settlement agreement.

[11] Community's application was not considered in the lottery results pursuant to the alternative relief granted Seacoast and Community in the May 27, 1986, letter allowing both Seacoast and Community to compete in the lottery and stating that Community would not be considered if selected first. *See* para. 6 *infra*.

[12] *See* Portland Cellular Partnership, 2 FCC Rcd 5586 (Mobile Serv. Div. 1986).

[13] Two of the stockholders of Utilities, the parent company of Seacoast, owned more than 1 percent of the stock of Community. Rotelcom, Inc. owned 16.2 percent of Utilities and 6% of the stock of Community and The Estate of Frank Southard owned 1.2 percent of the stock of Utilities and 17.12 percent of the stock of Community. The MSD found that these percentages represented a "substantial level of cross-ownership, that these applications did not demonstrate the existence of special circumstances [,and] that the purpose of Section 22.921 would not be served by the waiver request." *See* Portland Cellular Partnership, 2 FCC Rcd 5586, 5587 (Mobile Serv. Div. 1987). Accordingly, the MSD denied the waiver requests. *Id.*

[14] Northeast refers to "Northeast Motion for Appropriate Procedures Following Remand," filed June 15, 1990; its "Opposition to Memorandum of Portland Cellular Partnership Regarding Commission Action on Remand," filed July 16, 1990, and "Northeast Motion To Strike, and in the Alternative, Response of Northeast Cellular Telephone Company, L.P. To Reply of Portland Cellular Partnership," filed Aug. 23, 1990.

after its request was denied. Northeast further maintains that Community and Seacoast both requested that if the Commission denied the Section 22.921 waiver request, Seacoast's application be allowed to remain on file while Community's application would be dismissed with prejudice. Northeast argues that because Community did not appeal the order at the time, allowing it to do so now, would result in giving both Seacoast and Community a chance in the lottery -- the precise result that the Commission sought to prevent by adopting the cross-ownership rule.

2. Northeast; Petitions to Deny

a. Port Cell

8. In its petition against Northeast's application, Port Cell presents three arguments. First, it claims that the engineering exhibits contained in the original application contained numerous defects. For example, six of the seven cells proposed by Northeast for its cellular system contain 39 dBu extensions into adjacent NECMAs, and two cells contain extensions into Rural Service Areas (RSAs). Also, one of the cells proposed 39 dBu contours that extend into a central NECMA. Port Cell maintains that all of these extensions are in violation of the Commission's rules and precedent, citing *Alltel Cellular Assoc. of the Carolinas*, 61 Rad. Reg. 2d (P&F) 225, 227 & n.10 (Com. Car. Bur. 1986) and *Advanced Mobile Phone Service, Inc.*, 52 Rad. Reg. 2d (P&F) 1593, 1602-03 (Com. Car. Bur. 1983).

9. Second, Port Cell contends that Northeast failed to demonstrate reasonable assurance that the cell sites specified in its application were available. Port Cell claims that some of the sites proposed by Northeast were not available when its application was filed. There is no evidence, Port Cell claims, to suggest that Northeast or its agent contacted the owners of the sites to determine the sites were available. In fact, Port Cell notes that Northeast recently confirmed, in an amendment, that at least three of its originally proposed sites are, in fact, not available. This, Port Cell avers, is in violation of Commission rules and renders Northeast's application defective for lack of site availability.

10. Finally, Port Cell states that Northeast has failed to disclose the real party in interest behind its application. Port Cell expresses doubt that Northeast could have secured financing independently and thus concludes that United States Cellular Corporation (USCC), a subsidiary of Telephone and Data Systems, Inc. (TDS), is the real party in interest behind the application. Port Cell maintains that it is entitled to an evidentiary hearing to determine whether Northeast had reasonable assurance of site availability and whether Northeast is controlled by USCC and TDS.[15]

b. Saco River

11. Saco River maintains that changes in Northeast's ownership make it ineligible for a wireline authorization, under Section 22.902(b) of the Commission's Rules.[16] Saco River argues that the reorganized Northeast is not a common carrier engaged in the business of providing landline

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[15] The ownership history of Northeast is long and complicated. As explained by Northeast, in September 1983, Pine Tree Technology (PTT) and TDS entered into a Shareholders' Agreement providing for the creation of a joint venture corporation for the purpose of applying to the Commission to construct and operate wireline cellular systems in the Portland and Lewiston-Auburn, Maine, NECMAs. PTT was then the wholly owned subsidiary of The Pine Tree Telephone and Telegraph Company (Pine Tree Tel and Tel). Almost 95 percent of Pine Tree Tel and Tel's stock was and is owned by Timothy D. Hutchison. The Shareholders' Agreement provided that PTT would hold a 65 percent interest and TDS a 35 percent interest in the joint venture corporation. In 1985, PTT and TDS determined that the cellular applicant would be a limited partnership, with the same ownership percentages. In July 1985, the Articles of Incorporation for Maine State Cellular Telephone Company (Maine State), the proposed general partner corporation for the applicant partnership, were filed with the Maine Secretary of State. In 1986, TDS assigned its rights to acquire its shares to its newly formed and then wholly owned subsidiary, USCC. On March 14, 1986, PTT, USCC, and Maine State entered into the "Certificate and Agreement of Limited Partnership" for Northeast. This agreement has been amended several times. Wireline lotteries for the Portland and Lewiston NECMAs took place in May and November, 1986, and Northeast did not win either lottery.

In 1987, USCC entered into an option agreement to purchase a controlling interest in the non-wireline permittee in the Lewiston, Maine, NECMA. Under the Commission's rules and policies, USCC could not acquire the Lewiston non-wireline interest if it retained an interest in a Lewiston wireline application. Thus, Maine State, PTT, Mr. Hutchison, TDS, and USCC agreed that USCC would withdraw from Northeast, exercise its option to acquire the non-wireline interest in Lewiston and obtain an option to reacquire a minority interest in Northeast at some time in the future. In May 1988, USCC and the controlling partner in the Lewiston non-wireline partnership filed an application for transfer of control which was consummated on October 18, 1988. Between February 1, 1988 and October 8, 1990, TDS and USCC held no ownership interest in Northeast and played no part in its affairs. Prior to this, on October 27, 1987, Mr. Hutchison had purchased PTT from Pine Tree Tel and Tel giving PTT a 99 percent limited partnership interest in Northeast. Maine State continued to hold a 1 percent general partnership interest, with PTT holding a 51 percent interest in Maine State and Mr. Hutchison holding the remaining 49 percent interest personally. On December 20, 1988, in *Northeast Cellular Telephone Company, L.P. v. FCC*, No. 88-1563, U.S. Court of Appeals for the D.C. Circuit summarily affirmed the Commission's decision dismissing Northeast's application for the nonwireline license in the Lewiston NECMA. Thereafter, Northeast had no further possibility of obtaining an interest in the Lewiston NECMA and then could pursue its Portland application. Since USCC had no interest in the non-wireline licensee in Portland, USCC was no longer barred by the Commission's rules and policies from having a minority interest in Northeast. After the Court of Appeals decision vacating the Commission's grant of Port Cell's application, USCC and Mr. Hutchison agreed that USCC's subsidiary, USCOC of Portland, Inc. (USCOC), would acquire a 48.51 percent limited partnership interest in Northeast and a 49 percent interest in Maine State.

[16] Section 22.902(b) provides that:

> Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those areas in which they provide such landline service in some portion of the market.

telephone service and cannot meet the Commission's common carrier eligibility requirements. Saco River states that Northeast's only claim to connection with a local exchange telephone company providing service in the Portland NECMA is that its majority limited partner is owned by an individual who also owns shares in PTT, a wholly-owned subsidiary of Pine Tree Tel and Tel. According to Saco River, this shareholder relationship does not impute wireline presence in the market to Northeast.[17] In addition, Saco River contends that Northeast's proposed cell extension of "over 25 percent" for one cell is not *de minimis* and must be dismissed. Likewise, Saco River asserts that Northeast cannot be allowed now to amend its application to cure the defect.

12. In its consolidated reply, Northeast states that at the time its application was filed in March 1986, all of the extensions proposed in its application were *de minimis* and justified according to the Commission's Rules. Moreover, Northeast contends that even if its extensions are not *de minimis*, the Commission cannot now dismiss its application. It argues that, unlike the application of Saco River, Northeast included in its application a specific statement explaining why it was necessary "to engineer the particular cells such that the 39 dBu contours could not be kept within the SMSA or NECMA," citing *Cellular Applications Filing Procedures: An Update*, 52 Rad. Reg. 2d (P&F) 725, 726 (1982). Northeast concludes that, if the Commission does not accept the engineering explanation, it may only require that the applicant bring the 39 dBu contour back within the MSA or NECMA. Northeast uses its discussion of the Commission's *de minimis* policies to buttress its assertion that it should only be required to bring its contours into compliance should the Commission not accept Northeast's engineering explanation.

13. In addition, Northeast dismisses Port Cell's allegation that USCC is the real party in interest behind its application. At the time its application was filed, Pine Tree Technology was a wholly-owned subsidiary of Pine Tree Tel and Tel. Pine Tree Tel and Tel sold its interest in PTT to Mr. Timothy Hutchison, who now is its sole owner. Mr. Hutchison is also 95 percent shareholder of Pine Tree Tel and Tel. However, the telephone company no longer owns any interest in PTT or Northeast. By virtue of these changes, Saco River argues that Northeast is not a common carrier engaged in the business of providing landline telephone service. Northeast responds that Section 22.902(b) grants licenses to common carriers engaged directly or indirectly in the business of offering public landline message telephone service. There is no requirement, Northeast maintains, that wireline cellular applicants be owned by any commonly controlled telephone company.

14. Finally, Northeast contends that petitioners' allegation that it has not received reasonable assurance for its proposed sites is not correct. To counter petitioners' claim, (Northeast submits two sets of "Options to Acquire Easement" and "Letter of Intent") covering all seven of Northeast's cell sites. Over the past five years, Northeast notes that three of the original cell sites became unavailable and the options for the other cell sites expired. After it was named tentative selectee, Northeast renewed the options for Cells 3, 5, 6, and 7 and obtained new options, at nearby locations, for Cells 1, 2, and 4. Therefore, Northeast urges the Commission to reject this argument.[18]

B. Discussion

1. Community's Petitions

15. Upon review of Community's petitions, we find that Community has failed to demonstrate any Commission error in dismissing Port Cell's application and naming Northeast as the tentative selectee. In remanding the Commission's order granting the application of Port Cell, the court found that the Commission failed to comply with *WAIT Radio* because it did not articulate any standard by which the court could determine the policy underlying the Commission's waiver. The court indicated the type of specific information the Commission should have included in determining whether a waiver was appropriate. As we stated in the *Port Cell Remand Order*, the facts in this case simply do not demonstrate Port Cell's financial qualifications under the Commission's Rules, and its request for a waiver is without justification and therefore must be denied. *See Port Cell Remand Order*, 6 FCC Rcd 2283, 2284 (1991).

16. We also reject Community's argument that it should receive a second opportunity to be awarded the cellular license in the Portland market. Community can only receive a license if its request for a waiver of the cross-interest rule contained in Section 22.921 is granted. The record is clear that Community's application violated Section 22.921 and its contention that it is not under common control with Seacoast, at least for the purposes of our Rules, is simply erroneous. Moreover, Community has shown no facts that would support grant of a waiver. *See* n.12, *supra*. We have consistently applied Section 22.921 and find no justification in this case to depart from those

47 C.F.R. § 22.902(b).

[17] For support, Saco River cites Cellular Communications Systems, 86 FCC 2d 469, 487-491 (1981), *recon.*, 89 FCC 2d 58 (1982), *further recon.*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (wireline presence needed for eligibility) and Montgomery Independent Cellular Telephone Co., Inc., 2 FCC Rcd 4385 (Mobile Serv. Div. 1987), *recon. denied*, 3 FCC Rcd 396 (Com. Car. Bur. 1988), *review denied*, 4 FCC Rcd 2323 (1989) (84 percent interest in applicant held by entity not authorized to provide public landline telephone service).

[18] Subsequent to the filing of pleadings allowed under the Commission's Rules, Port Cell filed an additional pleading challenging Northeast's response in its reply that it had received reasonable assurance for its original Cell 2. Port Cell maintains that the coordinates for that proposed cell is a wetland area unsuitable for use. In its response, Northeast urges the Commission to reject the filing as an abuse of the FCC's processes, because Port Cell could have made this argument earlier in the proceeding. Neither of these additional pleadings is authorized by the Commission's Rules. However, since these pleadings relate to timely raised issues, in order to have a full record upon which to base our decision, we have considered the matters raised in these filings.

decisions.[19] We affirm the MSD's denial of Community's request for waiver of Section 22.921 and dismiss its application.[20]

2. Northeast; Petitions to Deny

a. 39 dBu Contour Extensions

17. We now turn to the petitions to dismiss or deny the Northeast application. At the time this application was filed, Commission policy stated that the 39 dBu contours as well as the Cellular Geographic Service Area (CGSA) should generally be kept within borders of the MSA or NECMA. However, the policy provided that minor overlap of 39 dBu contours into another MSA or NECMA would not render an application defective provided an explanation was included to show the contour incursions were necessary.[21] In the *Port Cell Remand Order*, we dismissed Saco River's applications because the proposed 39 dBu contour extension into the adjacent Lewiston-Auburn NECMA was not *de minimis*. Northeast, on the other hand, proposes extensions which are *de minimis* and includes in its application a detailed explanation regarding its 39 dBu contour extensions into neighboring market areas. In reviewing Northeast's application, for the reasons set forth below, we find the extent of the proposed extensions -- both as originally proposed and as amended -- to be *de minimis* and supported by an adequate engineering explanation. Neither Saco River nor Port Cell has presented any facts which demonstrate otherwise.

18. In its initial application, Northeast proposed the following extensions. Originally, Cell 001 extended beyond the CGSA into the Atlantic Ocean 5 square miles. This constituted only 3.6 percent of the land area of Cell 001 and obviously covered no population areas. The total 39 dBu extension area of Cell 002 initially proposed was 6.9 square miles into the Portsmouth NECMA. This extension constituted only 4.8 percent of Cell 002 and 0.68 percent of the Portsmouth NECMA. This cell extended into an area where there is an irregular NECMA boundary, and did not include a significant area of population. Northeast proposed a 39 dBu contour extension of Cell 003 into the Lewiston NECMA of 5.2 square miles or 2.9 percent of the entire cell area and 1.1 percent of the Lewiston NECMA. Again, the extension included an irregular NECMA boundary and did not appear to cover any significant population centers within the Lewiston NECMA. Likewise, the extension of Cell 004 into the Lewiston market constituted only 2.1 percent of the area of the entire cell and 1.2 percent of the area of the Lewiston NECMA and included an irregular NECMA border and covered no significant population centers. The originally proposed extensions of Cells 005, 006, and 007 were more significant. Northeast initially proposed to extend cell 005 34.9 square miles into the Lewiston NECMA, constituting 8.7 percent of the entire cell and 7.3 percent of the Lewiston NECMA. Cell 006 originally extended 20.9 square miles into the Lewiston NECMA and 20.8 square miles into Maine RSA 3, constituting 20.9 percent of the entire cell, 4.6 percent of the Lewiston NECMA, and 0.85 percent of Maine RSA 3. Originally, Cell 007 extended 6.7 square miles into the Lewiston NECMA which constituted only 2.8 percent of the 39 dBu contour of that cell and 1.4 percent of the Lewiston NECMA. In its initial application, Northeast offered the following explanation for its proposed extensions at Exhibit No. 3:

> The proposed CGSA has no extensions outside of the NECMA. The extensions of the 39 dBu contours of the base station sites are *de minimis* in that the area of the extensions encompasses 141 square miles which is 13 percent of the total NECMA area and 13 percent of the total CGSA area. The proposed CGSA does not extend into a central MSA as expressly prohibited in Section 22.903(a). The purpose of the extension is to provide coverage within the MSA and not to provide service outside it.
>
> The irregularly shaped NECMA border and the provision of contiguous highway coverage within the NECMA gives rise to the design proposed here. The area encompassed by the 39 dBu contours of the cells are necessitated by desire to serve area within the Portland ME NECMA. The design proposed here is necessary in order to provide quality service specifically along U.S. Highways 1, 201 and 302; State Highways 35, 125, 117, 26, 100, 9, 196, 125, 24 and 197; and Interstate Highway 95 as well as other routes leading into the NECMA of Portland, ME.

19. We find that the 39 dBu contour extensions proposed by Northeast in its original application were *de minimis* and that its engineering explanation -- relying on irregular boundaries and service within the Portland NECMA, particularly highways therein -- was acceptable. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constituted only 8.7 percent of the area of the Lewiston NECMA. Moreover, these extensions are not contiguous.[22] Thus, Northeast's original application was not defective.

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[19] *See, e.g.*, Progressive Cellular III B-3, 6 FCC Rcd 7178 (1991), *aff'd*, No. 92-1006 (D.C. Cir. Feb. 2, 1993); Florida Cellular Mobil Communications Corporation, 6 FCC Rcd 6910 (1991). Both Progressive and Florida Cellular filed requests for waivers of Section 22.921. The Commission denied the requests and dismissed the applications.

[20] We note that Section 22.19 provides: "If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's Rules." The alternative proposal provided by Community and Seacoast in their request for a waiver of Section 22.921 was that Community's application be dismissed if the waiver request is not granted. The MSD essentially acceded to this request. *See* Portland Cellular Partnership, 2 FCC Rcd at 5586-87; *see also*, n.6, *supra*.

[21] *See* Cellular Communications Systems, 89 FCC 2d 58, 87 (1982); Return of Round IV Cellular Applications, 103 FCC 2d 171, 172-74 (1986); Public Notice, Cellular Application Filing Procedures, An Update, 52 Rad. Reg. 2d (P&F) 725 (Mobile Serv. Div. 1982). Acceptable contour incursions are termed *de minimis* extensions. Contrary to our *dicta* in the *Port Cell Remand Order*, 6 FCC Rcd at 2284, if there is an adequate explanation, *de minimis* contour extensions into *any* MSA, NECMA, or other area were permissible.

[22] This is in stark contrast to Saco River's application, which covered 57 percent of the population and 41 percent of the area of the Lewiston NECMA.

20. On May 31, 1991, Northeast filed an amendment with the Commission, which, *inter alia*, modified its original engineering proposal.[23] Because Northeast's application as originally filed was acceptable, this amendment was not an impermissible attempt to correct a defect. Moreover, the amendment filed by Northeast did not contain substantial modifications to its technical proposal. It included only minor site changes necessitated by subsequent developments regarding site availability, and did not increase the proposed CGSA. Thus, Northeast's amendments constituted permissible minor amendments. *See* 47 C.F.R. § 22.23(c). We will, therefore, consider Northeast's application as amended.

21. With respect to the amended contours, Cell 001 contains no contour extensions. With respect to Cell 002, we note that the extension goes 2.8 square miles into the Portsmouth NECMA, and constitutes only 1.7 percent of the area of the entire cell and less than 1 percent of the Portsmouth NECMA. The cell extends into an area where there is an irregular NECMA boundary and does not appear to serve any significant population centers within the Portsmouth NECMA. Northeast has used a directional antenna to minimize the extension area. Cell 003 extends 5.1 miles into the Lewiston NECMA. The extension constitutes only 1.4 percent of the area of the entire cell and only 1 percent of the Lewiston NECMA. Again, there is an irregular NECMA boundary at the extension area and the extension does not appear to cover any significant population centers within the Lewiston NECMA. Within the Portland NECMA, Northeast has used reduced power to minimize the extension area. Cell 004 extends 3.3 miles into the Lewiston NECMA. This extension constitutes 1.2 percent of the area of the entire cell and less than 1 percent of the Lewiston NECMA. The extension area extends into an area where there is an irregular NECMA boundary and does not appear to cover any significant population centers within the Lewiston NECMA. Northeast has used a directional antenna to minimize the extension area. The amended extensions for Cells 002, 003, and 004 are clearly *de minimis* and well justified.

22. The extensions from amended Cells 005, 006, and 007, as with the original contours, are more significant. Nevertheless, we conclude they are *de minimis* and justified. Cell 005 extends 36.3 square miles into the Lewiston NECMA, which constitutes 9.1 percent of the area covered by the cell. The extension area covers less than 1 percent of the population of the Lewiston NECMA, however, and only 7.6 percent of its land area. Moreover, the NECMA boundary is irregular, the cell serves an area of the Maine Turnpike within the Portland NECMA that is close to the border of the Lewiston NECMA, and Northeast has used a directional antenna to minimize the extension area. Cell 006 extends 46.4 square miles outside the Portland NECMA -- 25.4 square miles into the Lewiston NECMA and 21 square miles into Maine Rural Service Area (RSA) 3. While this is 23.3 percent of the area of the cell, there is an irregular NECMA boundary and Northeast has used a directional antenna to minimize the extension area. The extension is only 5.3 percent of the area of the Lewiston NECMA and only 4 percent of the area of Maine RSA 3, and does not appear to cover any significant population centers therein. Finally, Cell 007 extends 49.2 square miles into Maine RSA 1. While this is 20.3 percent of the area of the cell, there is an irregular MSA boundary and Northeast has used a directional antenna. The extension covers only 1.3 percent of the area, and 5.2 percent of the population, of Maine RSA 1.

23. In sum, we conclude that each of Northeast's amended contour extensions is also *de minimis* and justified. The Portland NECMA has irregular borders and Northeast has clearly designed its system to cover the Portland NECMA and not adjacent areas. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constitutes only 15 percent of the area, and 7.3 percent of the population, of the Lewiston NECMA. Moreover, these extensions into the Lewiston NECMA are not contiguous. Thus, Northeast's application, as amended, is not defective.

b. Wireline Eligibility

24. We also reject the petitioners' argument that Northeast is not eligible for a wireline license because it is no longer a carrier engaged directly or indirectly in the business of providing public landline message telephone service. Pine Tree Tel and Tel is a wireline telephone operating company with access lines in three telephone exchanges, all of which serve the Portland NECMA. At the time Northeast's application was filed, PTT was a wholly owned subsidiary of Pine Tree Tel and Tel. While Saco River admits that through second-tier ownership by Pine Tree Tel and Tel, Northeast was eligible to apply for the wireline cellular system in Portland, it maintains that the subsequent sale of PTT to Timothy Hutchison changes the status of Northeast as a carrier.

25. Section 22.902(b) of the Rules states that "[c]ommon carriers engaged directly or indirectly in the business of affording public landline message service will be assigned frequencies from Cell System B in those areas in which they provide such landline service in some portion of the cellular market . . ." 47 C.F.R. § 22.902(b). The net changes in ownership of Hutchison, PTT, Pine Tree Tel and Tel, and Northeast are of no legal significance under the rules because there has been no cognizable shift in control. On the face of the application, Hutchison remains in control of PTT, Pine Tree Tel and Tel, and Northeast. The question of whether an applicant that is controlled by an individual who also controls a telephone company is an eligible wireline carrier is a case of first impression. The cases cited by Saco River do not present factual situations similar to the one at issue here. We conclude that an applicant is eligible in this situation because the individual (here, Mr. Hutchison) can, through his control of the telephone company, be reasonably deemed to be the repository of the expertise and experience of the telephone company that underlies the wireline set-aside. The general partner of the applicant is a subsidiary of a landline company. By definition of the Rule, the applicant is indirectly in the business of affording public landline message service. They are in control of the eligible carrier. Indeed, Saco River's argument, if accepted, would lead to the conclusion

[23] Northeast filed an additional amendment on October 25, 1991. This amendment modified only Cell 001 by lowering the proposed tower to meet Federal Aviation Administration requirements. This amendment also corrected the coordinates for the originally proposed location of Cell 002. *See* discussion ¶ ¶ 26-7, *infra*.

that the cellular subsidiaries of the Bell Regional Holding Companies are ineligible to be wireline licensees, contrary to the Commission's clear intent.

c. Real Party in Interest

26. In addition, we find Port Cell's allegations that either USCC or TDS controls Northeast to be unsupported. Neither of the two factual assertions of Port Cell -- that USCC owns a 48.51 percent limited partnership interest and that Northeast's finances are available only through guarantees of USCC or TDS -- raises a *prima facie* case that USCC or TDS is in control of Northeast. *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990); *Contel Corporation*, 6 FCC Rcd 1003 (1991). Accordingly, no evidentiary hearing is required under 47 U.S.C. § 309(d). *See also Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988). Moreover, even if a *prima facie* case had been presented, Northeast's response makes it clear that no substantial and material questions of fact exist on this issue. *See* 47 U.S.C. § 309(d); *Astroline*.[24]

d. Site Availability

27. Section 22.15(a)(1) of the Rules requires that "[a]pplications for fixed stations shall list the proposed antenna sites. The applicant shall have obtained reasonable assurance that it can use the site." The Revision and Update of Part 22 of the Public Mobile Radio Service Rules, *Report and Order*, 95 FCC 2d 769 (1983), stated that at the time an application is filed the applicant must determine that there is space available on an existing building or tower, or, if a new structure is to be built, that the property is available for such use and that it is reasonable to anticipate that it may use this space. Northeast has filed options for all its cell sites dated prior to the date of its application. Northeast explains that the coordinates of its proposed Cell 002 in its application as originally filed were 43^0 46' 03" North Latitude, 70^0 33' 13" West Longitude and that it had an Option to Acquire Easement between Kenneth Smith and USCC. The actual location of the Smith property was 43^0 46' 20" North Latitude, 70^0 32' 53" West Longitude, a miscalculation by Northeast's former consulting engineer. Because it was unable to renew the option on the Smith property in 1991, Northeast relocated Cell 002 to a nearby location.

28. On the basis of the record, we are persuaded that, when Northeast filed its application, it had received reasonable assurance of the site availability for its Cell 002, but that, through minor error, the coordinates noted in its application were incorrect. In addition, as explained by Northeast, three of the original cell sites, for Cells 001, 002, and 004, became unavailable and the options for the other cell sites expired.[25] Thus, at the time it filed its application, Northeast had reasonable assurance that its proposed sites were available and its application was not defective. In addition, since no substantial and material question of fact remains on this issue, an evidentiary hearing is not warranted. *See* 47 U.S.C. § 309(d); *Astroline*.

IV. CONCLUSION

29. Having reviewed the petition for reconsideration, the application for review, and petitions to dismiss or deny the application of Northeast, we affirm our decision in *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991), and find that Northeast Cellular Telephone Company, L.P. is financially, legally, technically, and otherwise qualified to become a Commission licensee. Petitioners have presented no basis for overturning our conclusions in the *Port Cell Remand Order*. We will, however, modify that Order to terminate Port Cell's interim operating authority only when Northeast is ready to begin providing service. We believe that this approach will best serve the public interest because it will prevent any interruption of service on the wireline frequency block in the Portland NECMA. To facilitate the transition, Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of such service.

V. ORDERING CLAUSES

30. Therefore, for the foregoing reasons, IT IS ORDERED THAT the application of Northeast Cellular Telephone Company, L.P. (File No. 27488-CL-P-152-B-86) IS GRANTED. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Portland, Maine, New England County Metropolitan Area and is further conditioned upon Northeast's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

31. IT IS FURTHER ORDERED THAT the Application for Review and Petition for Reconsideration filed by Community Services Telephone Company ARE DENIED.

32. IT IS FURTHER ORDERED THAT the Petition for Reconsideration and Reinstatement of License filed by Portland Cellular Partnership IS DISMISSED.

33. IT IS FURTHER ORDERED THAT the Petitions to Dismiss or Deny filed by Portland Cellular Partnership and Saco River Cellular, Inc., ARE DENIED.

34. IT IS FURTHER ORDERED THAT the application filed by Community Service Telephone Co. (File No. 27414-CL-P-152-B-86) IS DISMISSED.

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[24] In response to a letter from the Deputy Chief, Mobile Services Division, to Alan Naftalin, counsel to Northeast, (dated Feb. 7, 1992), Northeast provided an affidavit and other detailed materials showing that Mr. Hutchison has always been and remains in control of Northeast, distinguishing the instant proceeding from the La Star Cellular Telephone Company proceeding, on which Port Cell in part relies, where the majority partner took no steps to maintain control. *See* La Star Cellular Telephone Company, 6 FCC Rcd 6860 (I.D. 1991), *aff'd*, 7 FCC Rcd 3762 (1992). We are satisfied that Mr. Hutchison has taken sufficient steps in his dealings with USCC and TDS to demonstrate his control.

[25] Following its designation as tentative selectee, Northeast renewed options for Cells 003, 005, 006, and 007 and obtained new options, at nearby locations, for Cells 001, 002, and 004.

35. IT IS FURTHER ORDERED THAT Portland Cellular Partnership is granted interim operating authority to operate the Portland, Maine, wireline cellular system until Northeast Cellular Telephone Company, L.P. commences service.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 93-153

In the Matter of

Amendment of the Commission's Rules to Implement Section 4(g)(3) of the Communications Act of 1934, as Amended, 47 U.S.C. § 154(g)(3), the Commission's Statutory Gift Acceptance Authority.

NOTICE OF PROPOSED RULEMAKING

Adopted: May 26, 1993; Released: June 21, 1993

Comment Date: August 24, 1993
Reply Comment Date: October 23, 1993

By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rulemaking*, the Commission proposes rules to implement new section 4(g)(3) of the Communications Act, 47 U.S.C. § 154(g)(3), which authorizes the Commission to accept unconditional gifts, donations and bequests. Specifically, section 4(g)(3) authorizes the Commission, in furtherance of its functions, "to accept, hold, administer, and use unconditional gifts, donations, and bequests of real, personal, and other property (including voluntary and uncompensated services, as authorized by section 3109 of Title 5, United States Code). *See* 47 U.S.C. § 154(g)(3)(A). Under the new section, the Commission is required to promulgate regulations implementing its authority that "include provisions to preclude the acceptance of any gift, bequest or donation that would create a conflict of interest or the appearance of a conflict of interest." *See* 47 U.S.C. § 154(g)(3)(D).

2. The chief purpose of this *NPRM* is to propose regulations that would implement the conflict of interest restriction described above. In order to develop implementing regulations, the Commission has looked for guidance to the policies of other agencies that have statutory gift acceptance authority. Those policies are discussed in section II, below. The Commission has also looked for guidance in the provisions of the new government-wide standards of employee conduct, as well as General Services Administration regulations implementing agency acceptance of travel reimbursement, which are discussed in section III. Finally, in section IV, alternative proposals are set out for comment. Members of the public are requested to comment on the proposals set forth herein and are also encouraged to submit alternative proposals. Comment is also sought on Commission policies and procedures for reporting any gifts, donations or bequests under this new statutory authority.

II. POLICIES OF OTHER AGENCIES WITH STATUTORY GIFT ACCEPTANCE AUTHORITY

3. Congress has enacted statutes that afford a number of other Federal departments and agencies the requisite statutory authority to accept gifts, donations and bequests.[1] Apart from new section 4(g)(3), however, it appears that no other agency's gift acceptance statute contains conflict of interest limitations.[2] Nevertheless, several of the Federal entities with such authority have themselves imposed conflict of interest restrictions on, or developed general policies relating to, their gift and bequest authority.[3] In order to develop proposed regulations, we have summarized and discussed below two of these Departments' policies.

4. *Department of Treasury Directive.* To implement its gift acceptance authority, the Department of the Treasury has issued a directive that requires any employee approached

[1] The following other government entities have statutory gift acceptance authority: 1) Administrative Conference of the United States, 5 U.S.C. § 575(c)(12); 2) Board of International Broadcasting, 22 U.S.C. § 2876; 3) Department of Agriculture, 7 U.S.C. § 2269; 4) Central Intelligence Agency, 50 U.S.C. § 4031; 5) Department of Defense, 10 U.S.C. § 2601; 6) Department of Commerce, 15 U.S.C. § 1522; 7) Department of Education, 20 U.S.C. § 3481; 8) Department of Energy, 42 U.S.C. § 7262; 9) Department of Health and Human Services, 42 U.S.C. § 300aaa; 10) Department of Transportation, 49 U.S.C. § 1657(m); 11) Department of the Treasury, 31 U.S.C. § 321(d); 12) Food and Drug Administration, 21 U.S.C. § 871(c); 13) General Services Administration, 40 U.S.C. § 298a; 14) Institute of Museum Services (NEA/NEH), 20 U.S.C. § 966; 15) International Cultural and Trade Center Commission; 40 U.S.C. § 1106(f)(4); 16) Legal Services Corporation, 42 U.S.C. § 2996e(a)(2); 17) Library of Congress, 2 U.S.C. § 157; Lowell Historic Preservation Commission, 16 U.S.C. § 410cc-34; 18) National Science Foundation, 42 U.S.C. § 1870(f); 19) National Commission on Libraries and Information Science, 20 U.S.C. § 1503; 20) National Transportation Safety Board, 49 U.S.C. Appendix § 1903(b)(6)(F); 21) Pension Benefit Guaranty Corporation, 29 U.S.C. § 1302(b)(5); 22) Roosevelt Campobello International Park Commission, 16 U.S.C. § 1103; and 23) Securities Investor Protection Corporation, 15 U.S.C. § 78ccc(b)(6). Absent express statutory authority, agencies are prohibited from accepting gifts of money or property for the agency's use. *See* 16 Comp. Gen. 911, 912 (1937). The acceptance of a gift without the prerequisite statutory authority constitutes an impermissible augmentation of an agency's appropriated funds and, in such circumstances, the agency must remit the donation to the U.S. Treasury as a miscellaneous receipt. In contrast, gifts or other donations accepted pursuant to specific statutory authority are accounted for as trust funds and are deposited in the Treasury as trust proceeds under 31 U.S.C.§ 1321(b), to be disbursed to the agency in accordance with the terms of the trust.

[2] At the same time Congress enacted section 4(g)(3), Congress did, however, enact a provision that prohibits the Commerce Department from soliciting gifts for the National Telecommunications and Information Administration (NTIA), where such solicitation would create a conflict of interest or appearance thereof. *See* Telecommunications Authorizations Act of 1992, P.L. 102-538, section 105(e). That conflict of interest provision, however, applies only to circumstances in which gifts are solicited.

[3] In addition, the Department of Transportation, although it has no written policy governing conflicts of interest, does have an established policy not to accept offers of gifts and bequests where it has not been established that such acceptance would serve some recognized need or objective of the Department at a

regarding the possibility of a gift to refer the matter to the Assistant Secretary of the Treasury (Management) or his designee to review the gift offer. That official must determine, first, if a gift's acceptance will aid and facilitate the work of the Department and second, whether acceptance will create a conflict of interest.[4]

5. In making a conflict of interest determination, the Assistant Secretary is required to consider whether the donor has, or is seeking to obtain, contractual or other business or financial relations with the Treasury Department or "conducts operations or activities that are regulated by the Treasury Department.[5] If these elements are present, the Assistant Secretary must reject the gift "if the offer is, or appears to be, an attempt to influence official actions."[6] The Treasury Department's policy thus focuses primarily on the donor's motivation and, specifically, on whether the gift is designed to influence an official's action.

6. *Department of Health and Human Services.* The Department of Health and Human Services (HHS) recently issued a memorandum addressing conflicts of interest and the appearance of conflicts when using agency gift acceptance authority.[7] HHS ultimately applies a balancing test which involves a three-step analysis.[8] Most relevant to implementation of this Commission's gift authority is the second part of the HHS process, in which HHS examines the degree to which there is or appears to be a conflict of interest. HHS formulates the conflict of interest finding as a test to determine "whether the gift's acceptance would reflect unfavorably on the ability of the agency or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a governmental program or of any official involved in that program."

7. To determine whether these conflicts of interest concerns exist, the HHS memorandum suggests consideration of a number of factors. First, HHS considers whether the donor is a prohibited or non-prohibited source as defined in standards of employee conduct. Generally, the new agency-wide standards of employee conduct (which were finalized subsequent to the HHS memorandum) define a prohibited source as an entity which does business or seeks to do business with the agency, is seeking official action by the agency, conducts activities that are regulated by the agency, or which has interests that may be affected by the performance or non-performance of the employee's official duties. *See* 5 C.F.R. § 2635.203(d).[9] HHS notes that, when the donor is a prohibited source, there is an increased probability that an actual or apparent conflict of interest may exist and that such gifts require a higher degree of scrutiny.

8. If the donor is a prohibited source, HHS considers the nature and sensitivity of any matter pending before the agency that would affect the interests of the donor. Further, if some of the benefit of the gift will actually be enjoyed by an individual employee, HHS considers the significance of the employee's role in any such pending matter. HHS also takes into account generally whether the agency, rather than an individual employee, is actually receiving the majority of the gift's benefits.

9. Moreover, HHS looks at the effect of accepting the gift on entities which are outside the agency; *i.e.*, whether, and to what extent, any identifiable class of persons or entities would benefit from or be disadvantaged by the acceptance of the gift by the agency or component. HHS, in addition, ascertains whether the size or the nature of the gift alone raises a significant appearance concern. Finally, HHS, much like the Treasury Department, seeks to determine why the gift is being offered to the agency or operating component. HHS suggests consideration here of whether specifically known or ascertainable reasons for the gift may raise or diminish appearance concerns.[10]

10. The HHS Memorandum also addresses the solicitation of gifts. HHS opines that in order to solicit gifts from an outside source, an agency must have statutory authority. HHS notes that, where such authority exists, solicitation of gifts, particularly from prohibited sources, raises even greater ethical concerns than the mere acceptance of gifts. Indeed, the HHS policy is not to solicit gifts from prohibited sources at all.

III. IMPACT OF NEW GOVERNMENT-WIDE STANDARDS OF CONDUCT AND TRAVEL REGULATIONS

A. Standards of Employee Conduct

11. In formulating proposed rules, we have also examined the new Government-wide standards of employee conduct, which took effect on February 3, 1993. These standards, promulgated by the Office of Government Ethics (OGE), set forth the basic principles that apply to the

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savings in cost or other benefit to the work of the Department. When an offer is received, a written report must be prepared containing the following information: 1) offeror's name/address/description of offeror's business or profession; 2) a description of gift/ bequest; 3) amount of money/estimated value of property; 4) conditions/terms of offer (this would not apply to us since section 4(g)(3) requires gifts, bequests and donations to be unconditional); 5) function/operation where gift is proposed to be used; 6) how gift will be used and benefits; 7) estimate/description of costs to be incurred in putting gift in use; and 8) recommendation on whether offer should be accepted/rejected. *See* Department of Transportation Order 2700.11, issued April 10, 1973, concerning "Gifts and Bequests" at 1-2. *See also* para. 38, *infra*, regarding agencies that are subject to reporting requirements for gifts and bequests.

[4] Department of the Treasury Directive 61-09, entitled, "Implementation of the Department's Statutory Authority to Accept Gifts," issued April 8, 1987.

[5] *Id.* at 1.

[6] *Id.* at 2.

[7] Department of Health and Human Services Memorandum entitled, "Ethical Considerations Regarding the Use of Agency Gift Authority," dated April 29, 1992.

[8] *Id.* at 4 (references omitted.)

[9] The new government-wide standards of employee conduct also includes in the definition of prohibited source any organization in which a majority of the members are prohibited sources as defined above, *e.g.*, a trade association composed of regulated entities.

[10] *Id.* at 5-6. As the last step in the analysis, HHS weighs the agency's interest in accepting the gift against any actual or apparent conflicts of interest. *Id.* If the agency's interest in accepting the gift clearly outweighs any actual conflicts or potential appearance problems, the agency may accept the gift. Generally, however, if the agency's interest in accepting the gift does not clearly outweigh the conflicts concerns, the gift should not be accepted. *Id.* at 4-5.

acceptance of personal gifts by Federal employees (including any gifts that may be offered because of an employee's official position). *See* 57 Fed. Reg. 35019. The new government-wide rules expressly do not govern matters that are authorized by agency gift acceptance statutes or regulations promulgated thereunder. *See* 5 C.F.R. § 2635.105(c)(3). Accordingly, the OGE rules governing gifts to individual employees do not apply to any gifts to the Commission that are accepted under section 4(g)(3) authority. Nevertheless, in formulating conflict of interest standards, we have reviewed the standards and principles in the new rules.

12. The new government-wide standards address conflicts of interest by flatly prohibiting the acceptance of any gift in return for being influenced in the performance of an official act and bar employees from soliciting or coercing the offering of a gift.[11] In addition, the rules address conflicts of interest and "appearances" of such conflicts by generally prohibiting employees from soliciting or accepting gifts from a "prohibited" source.[12] As noted above, *supra* para. 11, prohibited sources generally include regulated entities and those who have interests that are affected by agency action. The rules, however, do contain exceptions and permit the acceptance of gifts from prohibited sources where, for example, the value of the gift is considered *de minimis* (less than $50 per year), and, in specified circumstances, where the agency itself has an interest in the employee's acceptance of the gift and that interest outweighs concern that the gift may or may appear to improperly influence the employee in the performance of his official duties. *See* 5 C.F.R. § 76.35.204(9)(3).

B. GSA Travel Reimbursement Regulations

13. The General Services Administration (GSA) recently issued new regulations to implement 31 U.S.C. § 1353, legislation enacted in 1989, which permits government agencies to accept payment from non-Federal sources for official travel and other expenses associated with employees' attendance at meetings. Prior to section 1353's enactment, many government agencies accepted such travel and subsistence payments pursuant to their gift acceptance statutes.[13] Section 1353, however, supersedes an agency's general gift acceptance statute, and thus, the new GSA regulations, which contain explicit conflict of interest provisions, are the governing Federal standard for agencies' acceptance of travel reimbursement. *See* 57 Fed. Reg. 53284.[14] Because GSA conflict of interest regulations appear to be the principal government standards applicable to an agency's, rather than an individual employee's, acceptance of benefits, the new GSA conflict of interest standards are especially relevant to any conflict of interest standards we may develop.

14. In this regard, the GSA regulations, much like the agency standards surveyed above, do not impose a blanket ban on travel payments from prohibited sources. Rather, the rules require authorized agency officials to undertake a case-by-case analysis and specify a number of relevant considerations, which, together with other relevant considerations, should guide the agency's determination. These factors include the identity of the non-Federal source, the nature and sensitivity of any matter pending at the agency affecting the interests of the non-Federal source, the significance of the employee's role in any such matter, the monetary value and character of the travel benefits offered by the non-Federal source, the purpose of the meeting and the identity of other expected participants. 41 C.F.R. § 304-1.5(a).

15. In explaining its new rules, GSA also provides several examples of the rules' applications and generally notes that the acceptance of payment should not be precluded solely on the basis that "the non-Federal source seeks official action on some matters from someone at the agency." 57 Fed. Reg. 53286. Consistent with the factors outlined in its rules, the GSA examples thus focus, not on the agency's responsibilities vis-a-vis the donor, but on the nature of responsibilities assigned to the particular employee receiving the travel benefit. Further, even where the employee has responsibilities that affect the entity providing the travel benefit, the examples indicate that conflict of interest concerns are lessened when the travel payment is from an association of prohibited sources, rather than a single entity, or where the employee's responsibilities concern rulemaking rather than adjudicatory matters affecting the donor.

16. According to GSA, the overall objective of such analysis is to determine whether the circumstances "make it appear that it is the donor's intent to influence the employee or agency in future actions or to reward the employee for past actions," or otherwise give rise to an appearance that the offer will improperly influence an employee in the performance of official duties. *Id.* In furtherance of this objective, the GSA regulations also provide that an agency, through its employee, shall not under any circumstances solicit payment from a non-Federal source. *See* 57 Fed. Reg. 53285; 41 C.F.R. § 304-1.2(b).

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[11] 5 C.F.R. § 2635.201(c)(1)(2).

[12] 5 C.F.R. § 2635.202. The rules also generally prohibit gifts given because of an employee's official position, even if the donor is not a prohibited source. The latter restriction, however, addresses, not conflicts of interest, but a concern that employees not use public office for private gain.

[13] We have reviewed the gift fund reports or partial reports from the following Governmental entities: 1) Department of Education; 2) Department of the Treasury; 3) Department of Transportation; 4) National Science Foundation; 5) National Archives; and 6) Department of Commerce. Our review of this material indicates that the vast majority of gifts accepted by the Departments of Commerce, Education and Treasury, NSF and Archives fall into the travel reimbursement and entertainment fund categories. Unlike the Commission, which has separate authority to accept travel reimbursement under section 4(g)(2), most departments and agencies had no separate statutory authority to accept reimbursement from outside private sources for travel and subsistence until the recent passage of the government-wide travel reimbursement program, 31 U.S.C. § 1353. Prior to § 1353, agencies thus had to rely on their gift and bequest funds to support such activities.

[14] We note that the Commission's acceptance of travel reimbursement for attendance at meetings is governed by explicit provisions of section 4(g)(2) of the Communications Act rather than section 1353. Nevertheless, as discussed above, section 1353's conflict of interest standards are pertinent to the manner in which the Commission implements its new gift acceptance authority.

IV. PROPOSED REGULATIONS

A. Purpose of Regulations

17. As set forth above, section 4(g)(3) requires the Commission to enact regulations that preclude the acceptance of gifts that "would create a conflict of interest or the appearance of a conflict of interest." From the preceding review of other agency policies, it appears that a variety of mechanisms and factors could be considered in implementing such requirements. Before proposing specific regulations, however, it is useful to set forth at the outset the purpose and function of conflict of interest regulations.

18. As reflected in the new OGE regulations governing employee conduct, the general purpose underlying "conflict of interest" requirements is to ensure that government employees "act impartially and do not give preferential treatment to any private organization or individual." 5 C.F.R. § 2635.101(b)(8). Similarly, the HHS conflict of interest provisions discussed above are designed to address a concern that acceptance of a gift would reflect unfavorably on the ability of an agency or any employee to carry out its responsibilities "in a fair and objective manner."

19. By comparison, where Federal employees have a personal financial interest in the outcome of a regulatory matter that is under the employee's official responsibility, or where employees have been promised a personal benefit or gift in exchange for performance or non-performance of regulatory duties, it is generally understood that a "conflict of interest" arises, or may arise, between an employee's interest in impartial performance of official duties and the employee's personal financial interests. To ensure, therefore, that employees maintain impartiality in performance of official duties, numerous Federal statutes and regulations govern employee participation in matters in which the employees have personal financial interests.[15] More fundamentally, employees are statutorily barred from accepting personal gifts in return for being influenced in the performance of any official act.[16] Many of these statutes impose heavy criminal penalties for non-compliance.

20. Beyond guarding against actual conflicts of interest, other requirements, such as the new OGE regulations governing employee conduct and individuals' acceptance of gifts, discussed above, seek to preserve public confidence in the integrity of government actions by avoiding even the appearance that Federal employees, irrespective of their actual impartiality, may have been influenced by personal gifts to take actions that favor particular persons or organizations. *See* 5 C.F.R. § 2635.101(b)(14) (employees shall avoid actions that create an appearance that the law has been violated). These regulations generally provide that such "appearances" questions should be analyzed from the perspective of a reasonable person with knowledge of the relevant facts. *Id.* With these purposes in mind, therefore, we shall proceed to examine proposed regulations in a context in which gifts are offered to and received, not by individual employees, a matter governed by the OGE rules, but by the Commission itself under section 4(g)(3). As we discuss below, we think this distinction is critical to our successful implementation of section 4(g)(3).

B. Proposals

21. From the foregoing, it is evident that section 4(g)(3) itself contains a "built in" restriction that is intended to preclude perhaps the most fundamental concern addressed in other conflict of interest statutes; namely, a concern that employees may accept gifts in return for performance or non-performance of official duties. In this regard, section 4(g)(3), unlike some agency gift acceptance statutes, expressly limits the Commission's gift acceptance authority to gifts that are "unconditional." This statutory restriction effectively precludes gifts that are made contingent on official action. To guard against any potential that official action could be influenced by gifts, it is therefore critical to ensure that the section 4(g)(3) prohibition on conditional gifts is carefully and scrupulously observed. As discussed more fully below, we intend to adopt appropriate regulations to carry out this requirement.

22. We recognize, in addition, that even where gifts are offered "unconditionally," issues nevertheless could arise concerning whether such gifts, even though not for the personal benefit of employees, could give rise to an appearance that employees nevertheless would be inclined to accord the donors preferential treatment. As discussed above, several other Federal agencies have recognized that such concerns may arise and have adopted policies intended to address these matters.

23. One means of avoiding any possible conflicts of interest or "appearance" concerns would be to preclude altogether gifts that are made by Commission regulatees and persons who have an interest in the outcome of Commission decisions. Indeed, the Commission has received a letter from four members of the Senate Committee on Commerce, Science and Transportation, expressing their view that the Commission should implement section 4(g)(3) by prohibiting gifts from such entities.[17] We therefore seek comment on this approach.

24. We note, however, that adopting such restrictive regulations would greatly reduce the usefulness of the Commission's gift acceptance authority. The Commission's jurisdiction is expansive and affects the activities and financial interests of a great many commercial and other entities. Thus, under this approach, a vast number of potential donors would be precluded from providing gifts. Moreover, regulated entities may be the most likely donors of equipment or other services that would be useful to the Commission in achieving more efficient performance of its regulatory functions. We note, for example, that regulated entities may benefit considerably from such efficiencies and therefore have the most incentive to offer gifts such as equipment. Furthermore, in some instances that involve the development of new technologies, the regulated entity is the only source for prototype equipment that should be tested prior to the development of technical standards or

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[15] *See, e.g.*, 47 U.S.C. § 154(b) (prohibiting certain financial interests by Commission employees); 18 U.S.C. § 208 (prohibiting government employees from participating in matters in which employees have financial interests); 18 U.S.C. § 209 (prohibiting supplementation of salary as compensation for official services).

[16] *See* 18 U.S.C. § 201(c)(1)(B) (prohibiting employees from demanding or accepting anything of value in return for performance of official acts); 5 U.S.C. § 7353(b)(1)(B) (prohibiting employees from accepting gifts in return for being influenced in the performance of any official act).

[17] *See* Letter of October 9, 1992 to then Chairman Sikes from Senators Danforth, Stevens, Inouye and Gorton, United States Senate Committee on Commerce, Science and Transportation.

other applicable regulations. Restrictive gift acceptance regulations could seriously inhibit the introduction of new technologies into the marketplace in a timely manner. Because agency gift acceptance statutes are generally intended as revenue enhancing measures, we are therefore reluctant to construe section 4(g)(3) in a manner that largely defeats that statutory objective.[18]

25. By comparison, we note that the General Services Administration in implementing section 1353, authorizing gifts of travel reimbursement, refused to impose a flat ban on travel payments made by prohibited sources. GSA concluded that such an approach would be an "unreasonable regulatory limitation" in view of section 1353's clear intent to permit agencies with tight travel budgets to benefit from travel payments donated from outside sources. In this regard, GSA pointed out that the groups most likely to pay travel expenses in order to hear a government speaker would be those whose activities are affected by the agency's programs. 57 Fed. Reg. 53286.

26. In light of the foregoing considerations, we also seek comment on alternative approaches that might be used to satisfy the statutory concerns regarding conflict of interest and appearances of conflict. Based on our review of other agencies' policies, there appears to be no normative standard in the context of agency gift acceptance that precludes such alternative approaches. Indeed, we have discovered no other government agency whose policy is to prohibit entirely the acceptance of official agency gifts from regulated entities. And, as explained above, the existing government-wide standards regarding employee gift acceptance are intended to apply only in a context in which gifts are received personally by Federal employees; there is no comparable standard for official agency gift acceptance.

27. We also note that gifts to agencies do not necessarily involve the same type or degree of conflicts or appearance concerns as when personal gifts are made to employees with decisionmaking responsibility, the area in which most traditional conflict of interest regulation, such as the OGE standards of employee conduct, has focused. In addition, even when gifts are made to employees personally, exceptions exist that permit gifts from regulated entities and other persons affected by agency action. Interestingly, as discussed, one of the principal exceptions that applies to an individual employee's gift acceptance under the new OGE government-wide standards exists when gifts to employees also serve official agency interests, a context that is similar to the area of official gift acceptance. Other exceptions exist when government interests are found to supersede "appearance" concerns that otherwise might be raised by employees personal and business relationships. *See* 5 C.F.R. § 2635.502(d). In short, even in the areas covered by existing conflict of interest regulation, "hard and fast" rules are not applied, especially when appearance concerns are balanced against competing governmental interests. For all of these reasons, therefore, we also seek comment on proposed regulations that are more flexible than imposing an absolute bar on the Commission's receipt of gifts from regulated entities.

28. In considering alternative approaches, we have proposed below various regulatory mechanisms that fall into three general classes. First, we propose structural approaches and certain absolute prohibitions designed to avoid both conflicts of interest and appearance concerns. Second, we propose the imposition of mandatory factors that agency officials must consider in determining whether conflicts or appearances problems may exist. Finally, we propose to adopt public disclosure and reporting requirements that are intended to minimize or eliminate appearance problems. We would expect that aspects of all three of these approaches might be used in any final agency regulation.[19]

1. Structural rules and prohibitions.

29. An important tool in avoiding conflicts of interests and appearance issues may be to insulate agency officials with programmatic responsibilities, insofar as possible, from involvement in determinations regarding gift acceptance, as well as from discussions with potential donors regarding those gifts. By comparison, we note that the Department of Treasury policies, discussed above, require employees to refer any offers of gifts to specified agency officials. In a similar fashion, our regulations might require both potential donors and agency employees who receive gift overtures to refer all matters concerning gifts to specified agency officials such as the Commission's designated agency ethics official (DAEO), perhaps in consultation with ethics officials in the Office of the General Counsel, or to management officials who do not have regulatory or policy making responsibilities.

30. Further, as indicated in the HHS policies, we think that an agency's solicitation of gifts from entities whose interests are affected by an agency's programs raises the greatest potential for concern with regard to possible conflicts of interest. We therefore propose an absolute bar on agency solicitation of gifts from regulated entities and others identified as prohibited sources under the new OGE standards of conduct.[20] In addition, to ensure that there is no potential for abuse, we would prohibit the acceptance of cash gifts and require that all monetary gifts be made by check payable to the agency.

31. As reflected in the policies of other agencies, we also think that conflicts of interest and appearance problems may be greatest when gifts made to the agency appear to enure more to the personal benefit of employees. We therefore seek comment on whether certain types of gifts should be prohibited altogether. For example, we might preclude altogether the Commission's acceptance of food and drink when made under section 4(g)(3). Such gifts are commonly associated with Commission employees' attendance at con-

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[18] *See* 138 Cong. Rec. H11732 (daily ed. October 5, 1992) (remarks of Rep. Rinaldo) (FCC's gift authorization is intended to assist the Commission in meeting "its increasing regulatory responsibilities given current budget constraints . . . .").

[19] Where gifts are not offered by "prohibited sources," as defined in the OGE regulations governing employee conduct, we believe that no conflicts of interest concerns arise. Accordingly, some of the proposals discussed below may be inapplicable to such gifts, and a simplified procedure may be adopted.

[20] Like HHS, however, when a regulated entity has expressed an unsolicited interest in supporting an agency's activities, we would permit agency officials to refer the potential donor to the appropriate official responsible for gift acceptance. We propose that that official may advise the donor of the availability of a gift fund, the types of equipment, property, or services that may be of use to the Commission, and the procedures for effectuating gifts.

ventions, meetings and other widely-attended events. Instead, acceptance of these types of gifts would continue to be governed by the government-wide standards of employee conduct, which provide for the acceptance of such gifts, or pursuant to other independent authority. As a general matter, we also propose not to accept gifts of travel expenses for attendance at meetings sponsored or co-sponsored by a non-government source under section 4(g)(3) and request comment on this proposal. Rather, employee travel expenses for such meetings would continue to be accepted pursuant to other statutory provisions, such as the provisions of the Government Employees Training Act, 5 U.S.C. § 4111, which permits individual employees to accept travel, subsistence and other expenses, when offered by organizations that are tax exempt under 26 U.S.C. § 501(c)(3). Gifts of travel expenses for such meetings could also be accepted pursuant to the provisions of section 4(g)(2) of the Communications Act.[21]

2. Mandatory Factors in Evaluating Conflicts of Interest.

32. Where gifts are offered by regulated entities and similar sources, we would require that the agency official with authority to accept the gift undertake a careful analysis to determine whether the gift's acceptance reflects unfavorably on the Commission's ability to carry out its responsibilities in a fair and impartial manner. As indicated above, we believe such concerns are accentuated when the gift in question enures to the benefit of the employee personally and not just to the agency. As proposed above, many types of gifts that appear primarily intended to benefit employees personally would not be accepted under section 4(g)(3). However, the possibility nevertheless remains that some gifts offered pursuant to section 4(g)(3) might also provide tangible benefits to employees.

33. We would therefore require that officials making conflicts of interests determinations evaluate at the outset the extent to which benefits of the gift might accrue to individual employees. For example, gifts of free training or attendance at conferences that are offered within the local Washington area, and, hence, which are covered neither by section 4(g)(2) of the Communications Act, nor the new government regulations implementing 31 U.S.C. § 1353, might fall within this category.[22] If the gift does benefit an individual employee, agency officials should go on to consider whether that employee is responsible for matters affecting the potential donor that are currently pending before the agency, and the significance of the employee's role in any such matter. Furthermore, where the gift involves local conference attendance or free training, factors to be considered might be analogous to those identified under new GSA regulations governing acceptance of travel and related fees, that implement section 1353. GSA, considers for example, a number of factors to determine whether the circumstances make it appear that it is the donor's intent to influence the employee or agency in future actions or to reward the employee for prior actions. *See* 57 *Fed. Reg.* 53287, and examples therein; 41 C.F.R. § 304-1-5.

34. Whether or not the proposed gift benefits employees personally, a variety of other factors should also be considered. The agency official making a conflicts determination should consider the nature and sensitivity of any matters pending at the Commission affecting the regulated source and the timing of the gift. For example, sensitivity may be heightened if a matter affecting the donor is currently pending on the Commission's Sunshine agenda at the time the gift is offered (or at the time the gift would be accepted).[23] Other factors would include the value of the gift and the frequency of gifts made by a particular donor. Commenters may also want to address whether it might be advisable to impose limitations on the value and frequency of gifts accepted from individual donors.

35. Finally, the Commission official making a conflict of interest determination must consider the specific reason that the donor provides concerning the reason underlying the gift. For example, if the donor's reason for the gift is that the donor expects to benefit from increased efficiency at the Commission, a benefit that presumably accrues to all regulatees impartially, or because the donor wants to take advantage of related tax benefits, any "appearance" concerns associated within the gift are likely to be diminished. For purposes of considering this factor, we propose that donors be required to supply a written statement specifying the reason for the gift, and how the donor expects to benefit. Donors would also be required to sign a verification that the gift is unconditional and is not contingent on any promise or expectation that the agency's receipt of the gift will benefit the donor in any regulatory matter. As explained below, such statements and verifications would be made available for public inspection.

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[21] We note, however, that section 4(g)(2) is only intended to address travel reimbursement for meetings that are "non-government sponsored functions." *See* H.R. Rep. No. 765, 97th Cong., 2d Sess. 26 (1982). In light of that, acceptance of travel reimbursement related to some types of events might be authorized by section 4(g)(3) rather than by section 4(g)(2). A similar approach is reflected in GSA regulations implementing section 1353, which governs other Federal agencies' travel reimbursement for attendance at "meetings." *See* note 14, *supra*. These regulations provide that section 1353 authority has no application to government-sponsored events or events required to carry out an agency's statutory and regulatory functions. *See* 41 C.F.R. § 304-1.2(3). Nevertheless, the GSA rules also make clear that section 1353 does not preclude the agency's use of its own gift acceptance statute to accept travel reimbursement for attendance at, or participation in, government-sponsored meetings or events required to carry out an agency's statutory or regulatory functions. *See* 41 C.F.R. § 304-1.8(a)(3); 57 *Fed. Reg.* 53285 (Nov. 9, 1992). Following this approach by analogy, it appears that the Commission's acceptance of travel reimbursement for some types of events, such as meetings with foreign correspondents to carry out international coordination activities provided for by treaty, might be accepted under the general authority of section 4(g)(3). We request comment on this view.

[22] *See* 47 U.S.C. § 154(g)(2), which, through cross reference to 47 U.S.C. § 4(g)(1), covers travel and related expenses "other than in the city of Washington." GSA regulations implementing section 1353 do not apply to employees other than those in travel status. *See* 41 C.F.R. § 304-1.2(a); 57 Fed. Reg. 53285.

[23] We would not propose, however, to reject a gift on conflicts or appearances grounds merely because the donor has matters pending at the agency. As a practical matter, Commission regulatees frequently have a variety of applications and other requests pending before us, many of which are routine in nature.

3. Public Disclosure and Reporting Requirements

36. Some gift and bequest statutes expressly impose a reporting requirement on the department or agency. For example, the Department of the Treasury's statute directs that the Secretary "shall, not less frequently than annually, make a public disclosure of the amount (and sources) of the gifts and bequests received under this subsection and the purposes for which amounts in the separate fund established under this subsection are expended." 31 U.S.C. § 321(d). Treasury's statute thus directs them to make information regarding gifts publicly available, not to file it with any specific authority, *e.g.*, Congress. Treasury fulfills this obligation simply by placing a copy of their trust fund report in their library.

37. Section 4(g)(3) imposes no reporting requirement upon the Commission. However, given that our statutory gift acceptance authority is coupled with explicit conflict of interest limitations, we propose to keep a detailed record of all gifts. As with all public trust funds, we may be called upon, at any time, to report about our gift fund to Congress or the General Accounting Office (GAO).[24]

38. Further, to avoid "appearances" problems and to enable the fullest public scrutiny of Commission actions in accepting gifts, we propose to make publicly available relevant information concerning any gifts that are accepted. Such information would include the identity of the source, a description of the gift, the gift's value, documentation concerning the donor's reason for the gift and a verification that the gift is unconditional. We would maintain this information in a designated location that is fully accessible to the public. We also seek comment on whether such information should be published annually in the Federal Register. We note that, for gifts below a certain dollar threshold, it may not be cost-effective to incur Federal Register publication expenses. Records might also be included in the Commission's Annual Report to Congress. In addition, we seek comment on whether we should afford a specified period of public notice before accepting gifts from prohibited sources that have a high monetary value.

V. CONCLUSION

39. As discussed above, we have developed several regulatory approaches that appear to satisfy the new provision in the Communications Act directing us to issue implementing regulations that preclude real and apparent conflicts of interest when implementing our gift acceptance authority. To assist us in our efforts, we invite public comment on these proposals. Although section 4(g)(3) contains no reporting requirement, we also propose to establish this type of requirement as part of our internal policies and procedures. Finally, commenters are invited to suggest other rules that would enable us to fulfill the congressional mandate.

VI. PROCEDURAL MATTERS

40. Pursuant to the applicable procedures set forth in section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 24, 1993** and reply comments on or before **October 23, 1993**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must submit an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, (Room 239), of the Federal Communications Commission.

41. This *Notice of Proposed Rulemaking* is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

42. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities as defined by section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.* (1981).

43. Authority to conduct this inquiry is given in sections 4(g)(3), 4(i), 4(j), 303(r) and 403 of the Communications Act, 5 U.S.C. § 154(g)(3), (i), (j), 303(r), and 403.

44. Further information on this proceeding may be obtained by contacting Sharon B. Kelley, Office of the General Counsel, 202/632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[24] Just this situation occurred with a number of departments in 1980, when GAO conducted a study of agency gift funds. A 1980 GAO Report stated that during fiscal year 1979, forty-one government agencies received a total of $21.6 million classified as gift revenues. *See* Review of Federal Agencies Gift Funds, FGMSD-80-77 (September 24, 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Provide
for the Use of the 220-222 MHz
Band by the Private Land Mobile
Radio Services

ORDER

Adopted: June 4, 1993; Released: June 21, 1993

By the Commission:

I. INTRODUCTION/BACKGROUND

1. On June 18, 1992, we adopted a *Memorandum Opinion and Order* that addressed the issues raised on reconsideration of the *Report and Order*[1] in PR Docket No. 89-552, as well as those presented by the *Further Notice of Proposed Rule Making*[2] issued in the same proceeding. The *Memorandum Opinion and Order* amended our rules to strengthen the construction and operating requirements applicable to non-commercial nationwide 220-222 MHz licensees in a manner designed to ensure that the non-commercial nationwide channels will be used as envisioned to satisfy nationwide internal communications needs.[3]

2. United Parcel Service of America, Inc. (UPS) has filed a Request for Clarification or Petition for Reconsideration[4] of certain of these rule changes. Specifically, UPS requests us to amend 47 C.F.R. § 90.733(d) to limit the amount of system capacity available for leasing to 20 percent, or to amend Section 90.733(d) to prohibit the leasing of excess capacity entirely during the initial ten-year license term. In the alternative, UPS requests that if Section 90.733(d) is maintained in its present form, construction benchmarks be adopted at one, three and five years, with a loss of license imposed for failure to meet these deadlines. In addition, UPS asks us to make plain that non-commercial nationwide applicants must rely solely on their qualifications and resources as of the time that their applications were filed in satisfying the requirement that they demonstrate a need for internal communications capacity in 70 or more markets. We have carefully analyzed the arguments UPS advances in support of its requests and the comments filed in response to the UPS petition. Our analysis persuades us that UPS's petition should be denied. In addition, upon re-examination of the non-commercial nationwide entry criteria adopted in the *Memorandum Opinion and Order*, we have decided on our own motion to amend 47 C.F.R. § 90.713(a)(6), which permits applicants to rely upon either an actual presence or a long-term business plan in satisfying the requirement that they demonstrate internal communications needs in 70 or more markets. For the reasons set forth in paragraph 10 of this *Order*, we are deleting that portion of Section 90.713(a)(6) that allows the use of a long-term business plan to satisfy the 70-market showing.

II. DISCUSSION

3. **Excess Capacity Leasing.** In support of its request that Section 90.733(d) be amended to restrict further the circumstances in which the leasing of excess capacity will be allowed, UPS contends that the rule in its present form may encourage speculation by permitting a licensee without legitimate non-commercial communications needs to begin constructing its system during the third or fourth year of licensing, complete construction at the five-year mark, and then act as a commercial provider without ever using the system for internal communications purposes.[5] Commenters responding to the UPS petition unanimously oppose the additional restrictions UPS requests, generally on the ground that they would hinder spectrum efficiency in terms of both spectrum utilization and the incentive to employ efficient technologies.[6] In addition, certain commenters urge that further restrictions on the leasing of excess capacity are unnecessary in view of the strengthened entry criteria adopted in the *Memorandum Opinion and Order*.[7]

4. In allowing non-commercial nationwide licensees to lease excess capacity, we noted that excess capacity is likely to exist only in those regions outside the largest metropoli-

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[1] Report and Order, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991).

[2] Further Notice of Proposed Rule Making, PR Docket No. 89-552, 7 FCC Rcd 898 (1992).

[3] Specifically, we amended the rules applicable to non-commercial nationwide licensees to (1) require nationwide non-commercial licensees to construct and place in operation at least one base station in a minimum of 70 markets within five rather than ten years of licensing; (2) prohibit the transfer or assignment of nationwide non-commercial licenses during the entire first ten-year license term rather than after 40 percent of the licensee's system has been constructed; (3) require non-commercial nationwide applicants to demonstrate an actual presence or long-term business plan that necessitates internal communications capacity in the 70 or more markets identified in the license application; and (4) prohibit the leasing of excess capacity during the first five years of the license term rather than permitting excess capacity leasing after 40 percent of the system is constructed. Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd 4484, 4489-91 (1992).

[4] United Parcel Service of America, Inc., Request for Clarification, PR Docket No. 89-552 (filed August 21, 1992). UPS's petition was placed on public notice September 23, 1992.

[5] UPS Petition at 5-6.

[6] *See, e.g.*, Comments of the Utilities Telecommunications Council (UTC) at 3-4; Comments of Echo Group, L.P. at 4-7; Comments of PLMRS Narrowband Corp. at 7-9; Comments of 360 Mobile Data Venture at 7; Comments of American Telephone and Telegraph Company (AT&T) at 2; Comments of Cellular Data, Inc. (CDI) at 2-4; Comments of American Radio Communications at 2.

[7] *See* Comments of Utilities Telecommunications Council (UTC) at 3; Comments of Echo Group, L.P. at 8.

tan areas or in rural localities, and consequently, that excess capacity leasing on these channels would be an efficacious way to satisfy the land mobile communications needs of the public and to increase the overall spectrum efficiency of the non-commercial nationwide channels.[8] To preserve the non-commercial character of this spectrum, however, we decided to require licensees to construct 40 percent of their systems before excess capacity leasing would be allowed.[9] We strengthened this requirement in the *Memorandum Opinion and Order* by barring the leasing of excess capacity entirely during the first five years of the license term.[10] We continue to believe that allowing the leasing of excess capacity only after expiration of the initial five-year period is the best way to balance our interests in spectrum efficiency and in ensuring that the non-commercial channels are used as intended. Accordingly, we deny UPS's request that Section 90.733(d) be amended to restrict further the circumstances in which non-commercial nationwide licensees may lease the excess capacity of their systems.

5. Nor do we agree that our rules should be amended to impose construction benchmarks on non-commercial nationwide licensees. We are convinced that our existing rules, which require licensees granted non-commercial nationwide authorizations to (1) construct and place in operation base stations in a minimum of 70 markets within five years or forfeit the entire nationwide license, 47 C.F.R. § 90.725(h),[11] and (2) include with their application a certification that they have sufficient resources to construct the entire system within five years of license grant and operate the system during the first five years of the license term, 47 C.F.R. §§ 90.713(a)(5), 90.713(b), 90.713(c)(4), are fully adequate to prevent the scenario UPS envisions. Clearly, if a non-commercial nationwide licensee is required to construct a station and place it in operation before the leasing of excess capacity is allowed, it logically follows that the licensee is using the station for internal communications purposes.[12]

6. **Amendment of Applications.** As indicated, UPS also urges us to make plain that each non-commercial nationwide applicant must rely solely on its internal communications needs and financial qualifications as of May 1, 1991,[13] when its application was filed. In support of this request, UPS contends that absent such a restriction, an applicant that may not be able to satisfy the entry criteria on the basis of its own qualifications will have an opportunity to "legitimize" itself by relying on the qualifications of a new entity that was not a party to the application at the time of filing.[14] In addition, UPS argues that the rules in effect at the time that the nationwide non-commercial applications were filed required applicants to certify that they intended to use the system to meet internal communications needs in 70 or more markets, and that as such, there is no need to allow applicants to amend their applications in response to the *Memorandum Opinion and Order*.[15] The Utilities Telecommunications Council (UTC) agrees with this aspect of UPS's argument and urges that only those applicants who were able to demonstrate a present or projected need for an internal communications system in at least 70 markets at the time their applications were filed should be permitted to submit amendments in response to the strengthened entry criteria adopted in the *Memorandum Opinion and Order*.[16] All other commenters argue that the entry criteria were changed significantly in the *Memorandum Opinion and Order*, and that as a result, it would be arbitrary and capricious for us to require applicants who filed their applications in good faith in accordance with the entry criteria in effect on the date of filing to be examined solely on the basis of their structure at that time.[17]

7. We agree that the rule changes adopted in the *Memorandum Opinion and Order* significantly altered the non-commercial nationwide entry criteria, and that consequently, applicants should be afforded an opportunity to amend their applications in response to our new rules.[18] In respects relevant here, our original entry criteria required a non-commercial nationwide applicant to certify that (1) within ten years of receiving a license, it would

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[8] Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2362.

[9] *Id.* The 40 percent construction benchmark was required to be satisfied at four years. Completing 40 percent construction earlier would have allowed the licensee to lease excess capacity less than four years into the license term.

[10] Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd at 4490-91.

[11] At this juncture we wish to clarify, as the recitation of the rules in paragraph 5 makes plain, that non-commercial nationwide licensees are required under 47 C.F.R. § 90.725(h) to construct *and* place in operation base stations in a minimum of 70 markets designated in the application within five years of license grant. Although Section 90.725(h) itself states only that the licensee must construct base stations in a minimum of 70 markets and does not explicitly discuss the operation requirement, several other rules, namely 47 C.F.R. §§ 90.713(a)(4), 90.713(a)(5), 90.713(b), and 90.713(c)(4), clearly indicate our intent that base stations be both constructed and placed in operation.

[12] In this connection, we wish to reemphasize that the non-commercial nationwide channels were set aside for applicants with nationwide internal communications needs in at least 70 markets. As aforementioned, in the *Report and Order* in PR Docket No. 89-552, we recognized that applicants may not require full use of their channels in some markets and consequently developed a regulatory scheme that balances our interests in spectrum efficiency and in guaranteeing that the non-commercial channels are used primarily for internal purposes. This dual regulatory scheme does not, however, permit applicants to convert their channels to private carrier use. *See* para. 9, *infra*. Such a conversion would be contrary to the nature of the nationwide non-commercial allocation.

[13] The Commission began accepting applications for licensing at 220-222 MHz on May 1, 1991. On May 24, 1991, the Chief of the Private Radio Bureau adopted and released an Order imposing a freeze on the acceptance of new applications. All of the nationwide non-commercial applications were filed on May 1, 1991.

[14] UPS Petition at 8.

[15] *See* Reply of United Parcel Service of America, Inc. at 6-7.

[16] Comments of UTC at 6.

[17] *See* Comments of UTC at 5; Comments of 360 Mobile Data Venture at 9; Comments of PLMRS Narrowband Corp. at 14-15; Comments of Columbia Cellular Corp. at 6.

[18] This opportunity will, however, be extended only to those applicants that satisfied the entry criteria in effect at the time of filing. In our view, the filing of amendments should be limited to those applicants able to satisfy the original entry criteria because to hold otherwise would in effect provide unqualified applicants an unauthorized second chance to secure a nationwide non-commercial authorization, and would undermine our original filing window.

construct and place in operation a minimum of one base station in at least 70 geographic areas; (2) within four years of receiving a license, it would construct and place in operation 40 percent of the system, including base stations dedicated to non-commercial operations in at least 28 specified urban areas;[19] and (3) that it had the requisite financing to satisfy these obligations.[20] In both the *Further Notice of Proposed Rule Making* and the *Memorandum Opinion and Order* issued subsequently in PR Docket No. 89-552, we indicated our concern that these requirements may not be stringent enough to guarantee that the non-commercial nationwide channels will be used as intended primarily for nationwide internal communications purposes.[21] Consequently, we strengthened the entry criteria by shortening the construction period from ten to five years, by requiring each applicant to demonstrate an actual presence or long-term business plan necessitating internal communications capacity in 70 or more markets, and by prohibiting the leasing of excess capacity during the first five years of the license term.[22]

8. As indicated, UPS and UTC argue that our rules always required nationwide non-commercial applicants to demonstrate a nationwide presence defined by a need for internal communications capacity in 70 or more markets. We disagree. Indeed, the fact that our initial rules did not clearly require each applicant to demonstrate non-commercial communications requirements in 70 or more markets is precisely what prompted us to adopt the rule changes set forth in the *Memorandum Opinion and Order*. Our initial rules, on their face, only required non-commercial applicants to demonstrate internal communications needs in 28 markets; the showing with respect to the remainder of the markets arguably could be comprised in part of base stations engaged in the leasing of excess capacity on a for-profit, private carrier basis.[23] The likelihood of such a configuration and the fact that it would undermine the non-commercial character of the channels set aside for non-commercial communications provided the basis for the adoption of the requirement that applicants for the non-commercial channels must demonstrate at the outset an actual presence or long-term business plan necessitating internal communications capacity in 70 or more markets.[24]

9. Because the *Memorandum Opinion and Order* did change the non-commercial nationwide entry criteria, it is entirely possible that an applicant able to satisfy the original requirements may need to amend its application in response to the rules in their strengthened form. For example, an applicant that was able to demonstrate that it had the financing to construct and operate base stations in 70 markets within ten years may need to amend its application in order to demonstrate that it has the financial resources to meet the shortened, five-year construction requirement. Whether the applicant does so in part through the acquisition of a new entity is a matter of business judgment that is outside the scope of our concern, provided that the applicable rules governing assignments and transfers of control are complied with.[25] Similarly, it is entirely conceivable that an applicant able to demonstrate internal communications requirements in 28 markets may need to amend its application in order to show a presence in 70 or more markets necessitating internal communications capacity. Again, as long as our rules governing transfers of control are not contravened, the fact that an applicant may do this by acquiring new entities is a matter of business judgment. Significantly, that a non-commercial nationwide applicant may be comprised of several entities does not necessarily undermine the non-commercial character of the channels involved: 47 C.F.R. § 90.703(b) acts as a safeguard preventing an applicant so comprised from acting as a private commercial carrier by allowing non-commercial nationwide applicants to share system capacity with other eligible entities only on a not-for-profit, cost-shared basis.[26] We intend to enforce this rule, and to ensure that the non-commercial nationwide channels are used for their envisioned purpose, by requiring that despite an applicant's composition, until the leasing of excess capacity is permitted, (1) all nationwide non-commercial spectrum is used solely for internal communications; (2) all associated entities undertake their proportionate share of the costs of operation; and (3) no entity is allowed to extract a profit for communications services provided on these channels.

10. Elimination of Long-term Business Plan Showing. As mentioned, we have decided to amend that portion of 47 C.F.R. § 90.713(a)(6) that permits non-commercial nationwide applicants to rely upon a long-term business plan in satisfying the requirement that they demonstrate a need for non-commercial communications capacity in 70 or more markets. Under the rule in its new form, applicants will be required to demonstrate an actual presence, and will not be allowed to rely upon a projected need based on a long-term business plan. We are amending Section 90.713(a)(6) in this manner because, upon further reflection, we have concluded that the long-term business plan aspect of the rule is so amorphous as to be nearly impossible either to measure or to enforce.[27] As a result, this portion of the

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[19] Our orignial rules provided that after the four-year benchmark was met, a non-commercial nationwide licensee could resell excess capacity on a private carrier basis. Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2361-2362.

[20] *See* Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2398-99, 2407.

[21] *See* Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd at 4489-91; Further Notice of Proposed Rule Making, PR Docket No. 89-552, 7 FCC Rcd at 899.

[22] *See supra* note 3.

[23] *See* Report and Order, PR Docket No. 89-552, 6 FCC Rcd at 2362 & n.83.

[24] Also contrary to UPS and UTC's claim, we explicitly stated in the *Memorandum Opinion and Order* that because we were adopting rule changes that significantly altered the construction and operating requirements applicable to non-commercial nationwide licensees, we anticipated that certain applicants would be unable to satisfy the new requirements, and that such entities would be granted a refund if they chose to withdraw their applications. Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd at 4489 n.66.

[25] *See* 47 C.F.R. § 90.709.

[26] *See generally* Memorandum Opinion and Order, PR Docket No. 18921, 93 FCC 2d 1127 (1983) (defining cooperative sharing arrangements).

[27] In the *Further Notice of Proposed Rule Making*, issued in PR Docket No. 89-552, 7 FCC Rcd at 899, we asked commenters that favored the adoption of a rule allowing applicants to use a long-term business plan to suggest a methodology for measuring this showing. Only UPS discussed this point. UPS's suggestion, that a lesser comparative preference be awarded in those markets where the applicant has only a projected presence, pertained to proposed criteria to be used in conjunction with comparative hearings. *See* Comments of UPS at 9, 12-13 (filed March 2, 1992). This suggestion is of little utility in the random selection context.

rule is susceptible to the type of abuse that could easily undermine the non-commercial nature of the channels explicitly set aside for internal communications.[28]

III. CONCLUSION

11. To summarize, we are denying UPS's request that we further limit the circumstances in which the leasing of excess capacity of non-commercial nationwide channels is allowed. UPS's requested clarification to the effect that non-commercial nationwide applicants must rely solely on their internal communications needs and financial qualifications as of the date the application was filed is also denied. Instead, applicants that were able to satisfy the entry criteria in effect at the time of filing will be permitted to amend their applications in response to the rule changes adopted in the *Memorandum Opinion and Order* issued earlier in this proceeding. We are also amending 47 C.F.R. § 90.713(a)(6) to require applicants to demonstrate an actual presence in 70 or more markets specified in the application necessitating internal communications capacity.

12. Finally, we are taking this opportunity to clarify 47 C.F.R. § 90.713(a)(1) and 90.725(h). The clarification of these rules is minor and noncontroversial and does not affect the substantive content of the rule. As such, we find good cause for concluding that the notice and comment requirements of the Administrative Procedure Act are inapplicable in this instance. *See* 5 U.S.C. § 553(b)(3).

13. Accordingly, IT IS ORDERED that the Petition for Clarification or Reconsideration filed by United Parcel Service of America, Inc., on August 21, 1992, is DENIED.

14. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, is amended as set forth in the Appendix below, effective ninety days after publication in the Federal Register.

15. For further information with respect to this proceeding, contact Karen Kincaid, Rules Branch, Private Radio Bureau, telephone (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile radio services

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 332 48 Stat., 1066, 1082, as amended; 47 U.S.C. §§ 154, 303 and 332 unless otherwise noted.

2. Section 90.713 is amended by revising paragraphs (a)(1) and (a)(6) to read as follows:

§ 90.713 Entry criteria.

(a) * * *

(1) Applicants for commercial nationwide channels must include certification that, within ten years of receiving a license, the applicant will construct a minimum of one base station in at least 70 different geographic areas designated in the application; that base stations will be located in a minimum of 28 of the 100 urban areas listed in Section 90.741; and that each base station will have all five assigned nationwide channels constructed and placed in operation (regularly interacting with mobile and/or portable units). Applicants for non-commercial nationwide channels must include certification that, within five years of receiving a license, the applicant will construct a minimum of at least one base station in at least 70 different geographic areas designated in the application; that base stations will be located in a minimum of 28 of the 100 urban areas listed in Section 90.741; that each base station in the ten large urban areas designated in Section 90.725(h) will have all assigned nationwide channels constructed and placed in operation (regularly interacting with mobile and/or portable units); and that all other base stations will have a minimum of five of the assigned nationwide channels constructed and placed in operation.

* * * * *

(6) Applicants for non-commercial nationwide licensing must also submit a certification demonstrating an actual presence necessitating internal communications capacity in the 70 or more markets identified in the license application.

* * * * *

3. Section 90.725 is amended by revising the first two sentences of paragraph (h) to read as follows:

§ 90.725 Construction requirements.

[28] Because this represents a significant change in the entry criteria applicable to non-commercial nationwide applicants, we will permit any applicant seeking to withdraw its application prior to the effective date of our new rules to obtain a refund of its application filing fees. *See* 47 C.F.R. § 1.1111(a)(4). We will require submission of the showings required of non-commercial nationwide applicants under the *Memorandum Opinion and Order* and this *Order* once approval from the Office of Management and Budget (OMB) has been obtained pursuant to the Paperwork Reduction Act. We delegate authority to the Chief of the Private Radio Bureau to announce the date that non-commercial applicants will be required to file the additional submissions through issuance of a Public Notice.

* * * * *

(h) Licensees granted non-commercial nationwide authorizations will be required to construct and place in operation base stations in a minimum of 70 markets designated in the application within five years of the initial license grant. Base stations of 10-channel non-commercial nationwide systems that are located in any of the ten large urban areas listed in the following Table (base stations are considered located in the following ten large urban areas if they are within 60 kilometers (37.3 miles) of the coordinates listed) must have all 10 channels constructed and placed in operation within 5 years of the initial license grant:

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.316(a) of the Commission's Rules — RM-7566

ORDER

Adopted: June 11, 1993; **Released: June 21, 1993**

By the Commission:

1. On November 20, 1989 a Petition for Rulemaking was filed with the Commission by Ozark Broadcasting Corporation, licensee of station WOAB-FM, Ozark, Alabama. Ozark requested in their filing that the Commission amend Part 73 of its rules to permit commercial FM stations to operate with vertical polarization only. The Ozark petition was assigned RM-7566 and put out for comment on January 14, 1991. No comments were received.

2. Rule Section 73.316(a) states: "It shall be standard to employ horizontal polarization; however, circular or elliptical polarization may be employed if desired. Clockwise or counterclockwise rotation may be used. The supplemental vertically polarized effective radiated power required for circular or elliptical polarization shall in no event exceed the effective radiated power authorized." The effect of this rule is to require all commercial FM stations to utilize either horizontal polarization, or a combination of horizontal and vertical polarization, for their signals.[1] It does not permit the use of vertical polarization alone.

3. Ozark contends in its petition that most FM receiving antennas are vertically polarized and therefore it is not necessary for stations to waste power by broadcasting both horizontally and vertically polarized signals. The proposed change would allow stations "to operate at lower transmitter power, consuming less energy, and still provide essentially the same coverage." Ozark did not submit any studies or data to support this assertion.

4. As a general matter vertically polarized signals (in the FM band) do not propagate as far as horizontally polarized signals. Further, the vertical signals are more prone to reflection and scatter and, consequently, multipath interference. The reason for transmitting a vertically polarized signal as well as a horizontally polarized signal is to attempt to improve reception in cities by using that reflective property of the vertical component to fill in "shadows" created by commercial buildings. The vertical signal supplements the horizontal signal; it does not merely duplicate it.

5. An antenna mounted on the metal body of an automobile will receive signals transmitted with any polarization to some degree. The value of mounting the antenna vertically is that it tends to be non-directional in the horizontal plane and therefore works well with signals received from any direction. An antenna mounted horizontally, such as the type built into windshields, is directional and does not respond well to signals received from either end of the antenna. Antennas attached to home or portable receivers are adjustable and can take any orientation; therefore they can be made to work with any polarization.

6. Horizontally polarized signals propagate farther than vertically polarized signals beyond the horizon. Also, while both types are reflected by buildings, hills and other objects and give rise to multipath problems, the effect is more pronounced in the vertical signals. Ozark has not submitted any evidence to demonstrate how vertical receiving antennas offer any benefits which might outweigh these differences and render the horizontal signal superfluous. Accordingly, we do not believe that any useful purpose would be served by further consideration of this matter.

7. Therefore, IT IS ORDERED, That, pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, RM-7566 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Noncommercial educational stations are permitted to utilize vertical-only polarization in accordance with Rule Section 73.525(b)(3) in order to afford interference protection to TV Channel 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PAGE AMERICA OF NEW YORK, INC. File No. 22971-CD-P/ML-01-90

For facilities in the
Public Land Mobile Service
at Meriden, Connecticut,
for station KAD510

PAGING ASSOCIATES, INC. File No. 24951-CD-P/ML-90

For facilities in the
Public Land Mobile Service
at West Haven, Connecticut,
for station KUC925

MEMORANDUM OPINION & ORDER

Adopted: May 27, 1993; Released: June 21, 1993

By the Commission:

I. INTRODUCTION

1. Before us is an application for review, filed by Paging Associates, Inc. (Associates),[1] of a Common Carrier Bureau (Bureau) decision upholding an order of the Mobile Services Division (MSD) which dismissed an application filed by Associates for facilities in the Public Land Mobile Service (PLMS) on frequency 454.600 MHz at West Haven, Connecticut, and granted the mutually exclusive captioned application of Page America of New York, Inc. (Page America) for PLMS facilities on frequency 454.600 MHz at Meriden, Connecticut.[2] For the reasons discussed below, the application for review filed by Associates is denied.

II. BACKGROUND

2. Page America filed an application for frequency 454.525 MHz at Meriden, Connecticut, on December 27, 1989. Subsequently, Page America was assigned an application for frequency 454.600 MHz from NYNEX Paging Company (NYNEX). *Public Notice*, Mimeo No. 2385 (released Mar. 28, 1990).[3] Both the 454.525 MHz and 454.600 MHz applications were simultaneously pending before the MSD. However, Page America filed a letter dated January 25, 1991 that requested dismissal of its 454.525 MHz application. The Commission acted upon the request by public notice. See *Public Notice*, Report No. 91-19-A (released Feb. 6, 1991); *Division Order*, 7 FCC Rcd at 1306.

3. Associates filed a petition to deny the 454.600 MHz application, arguing that: (1) the captioned application was "repetitious" under Section 22.22 of the Rules[4] because it was filed less than twelve months after the Page America frequency 454.525 MHz application was dismissed; (2) Page America did not file a loading study, as required by Section 22.516 of the Rules,[5] in order to justify the simultaneous pendency of its captioned application and the frequency 454.525 MHz application; and (3) Page America was "warehousing" frequencies in the Meriden, Connecticut, area. See *Division Order*, 7 FCC Rcd at 1307. In dismissing the petition filed by Associates, the MSD held that Section 22.22 did not apply because the frequency 454.525 MHz application had not been involved in a "hearing" as required by Section 22.22(a). The MSD also ruled that waiver of the Section 22.516 loading study requirement was justified because the frequency 454.525 MHz application was dismissed, leaving Page America with only one pending application. Lastly, the MSD found that Associates had failed to present any evidence that Page America was engaging in warehousing.

4. Associates then filed a petition for reconsideration of the dismissal, arguing that the MSD failed to discuss whether the involvement of Page America's frequency 454.525 MHz application in the proceeding *Radio Call Company, Inc.*, 6 FCC Rcd 351 (Com. Car. Bur. 1991) (*Radio Call*), constituted a "hearing" within the meaning of Section 22.22 of the Rules. Associates also contended that the MSD erroneously waived the loading study requirement, reasoning that the *Radio Call* decision should have been controlling because it was occasioned by Page America's raising a similar loading study argument. Lastly, Associates argued that Page America violated the *ex parte* rules by not serving it with a copy of a letter that voluntarily dismissed the

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[1] Associates has also filed a motion to strike Page America's opposition because it was more than ten pages long but did not include a table of contents and summary, as required by Section 1.49 of the Commission's Rules. We will accept Page America's opposition, noting that it submitted the missing sections, which are in any event minor omissions, in its opposition to the motion to strike.

[2] *Page America of New York, Inc.*, 7 FCC Rcd 4408 (Com. Car. Bur. 1992) (*Bureau Order*); *Page America of New York, Inc.*, 7 FCC Rcd 1306 (Mobile Serv. Div. 1992) (*Division Order*).

[3] After the 454.600 MHz application was assigned to Page America, it was involved in a lottery held on March 13, 1991, and was ranked first. *Public Notice*, Mimeo No. 12170 (released Mar. 14, 1991).

[4] Section 22.22 provides, in pertinent part:

> (a) Where an applicant has been afforded an opportunity for a hearing with respect to a particular application for a new station, or for an extension or enlargement of a service or facilities, and the Commission has, after *hearing* or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application involving service of the same kind to the same area by the same applicant, or by his successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of the Commission's order . . . . (emphasis added)

[5] Section 22.516 provides that:

> Traffic load studies shall be required [for] [a]pplications which request an additional frequency for an existing one-way signaling station . . .

frequency 454.525 MHz application, which it claims it was entitled to receive because it had filed an application that was allegedly mutually exclusive with Page America's frequency 454.525 MHz application.

5. The Bureau denied the petition for reconsideration, holding that the *Radio Call* order could not be construed to have been a "hearing" within the meaning of Section 22.22 of the Rules. The Bureau further held that the MSD properly waived the loading study requirement because Page America did not maintain more than one application on file. In conclusion, the Bureau ruled that the dismissal letter was not *ex parte* because it dealt with the frequency 454.525 MHz application, which was not mutually exclusive with the 454.600 MHz application filed by Associates.

III. DISCUSSION

6. Associates argues that the Bureau erroneously followed *Lou Goldstein d/b/a West Florida Communications*, 5 FCC Rcd 5724 (Com. Car. Bur. 1990) (*Lou Goldstein*), in upholding the MSD's waiver of the loading study requirement. Section 22.516 of the Rules is designed to prevent warehousing by requiring those who file for more than one paging application to provide a traffic loading study that demonstrates a public need for the extra channels. *Regulatory Policies and Procedures for Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191, 193 (1983). In *Lou Goldstein*, the Bureau waived the loading study requirement because the applicant had assigned the "extra" application and was left with only one application pending in the market, which presented no danger of warehousing. Similarly, Page America filed a letter[6] seeking dismissal of its frequency 454.525 MHz application for Meriden, leaving it with only the captioned application pending in the market. We find that there is no merit to the argument advanced by Associates.

7. Associates also argues that *Lou Goldstein* is distinguishable because there the application was not mutually exclusive with another, as in the instant case. We disagree. The anti-warehousing purpose of the Section 22.516 loading study requirement serves to bar warehousing of frequencies regardless of whether the applicant under scrutiny is mutually exclusive with another. Therefore, the lack of a mutually exclusive applicant in *Lou Goldstein* is irrelevant. In *Lou Goldstein*, as in the instant case, the applicant took action to leave only one pending paging application in the market, obviating the necessity of a loading study and justifying a waiver.[7] We therefore find that the Bureau appropriately upheld the grant of the loading study waiver under the appropriate precedent.

8. Associates next contends that *Radio Call* should be controlling,[8] reasoning that because Page America raised a loading study argument in *Radio Call* it is dispositive in this case. In *Radio Call*, the applicant sought a waiver in order to maintain its several applications on file without a traffic loading justification. In the instant case, Page America has dismissed its second application.[9] Accordingly, we cannot find that *Radio Call* applies to the facts of the instant case.

9. Nor can we adopt the contention made by Associates that the Bureau "improperly narrow[ed] the scope of Section 22.22 by reading language which is not there." Application for Review at 11. The purpose of Section 22.22 of the Rules is to prevent the needless administrative burden of reviewing "repetitious" applications filed by an applicant where the Commission has dismissed another similar application from the same party within the last twelve months "after hearing or default." 47 C.F.R. Section 22.22. The Bureau held that no "hearing" had occurred in this case because a paging applicant must first file a request stating how the public interest would be served by a hearing instead of a lottery, and the Commission must then issue an order designating the application for a hearing. 47 C.F.R. Section 22.33(c); *see also Bureau Order*. As no hearing designation order was issued or sought in *Radio Call*, we find that the Bureau was correct in ruling that the subsequent application was not repetitious. Associates further urges that we hold that *Radio Call* did constitute a

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[6] We find no merit in the argument made by Associates that the letter requesting dismissal of the frequency 454.525 MHz application was ineffective because it had already been granted. An authorization may be set aside, after it has been granted, and then the application is dismissed. *See* Section 1.113 of the Rules. It appears that the public notice harmlessly omitted the phrase that the authorization was "set aside." However, inasmuch as the public notice dismissed the application, it is reasonably implied that the authorization must have first been set aside.

[7] We also reject the contention made by Associates that Page America had "effectively reserved" frequency 454.525 MHz for itself. The Bureau dealt fully and correctly with this issue and we see no need to revisit it here. *See Bureau Order*, 7 FCC Rcd at 4410, n.8. Also, Associates cites *Northeast Cellular Telephone v. FCC*, 897 F.2d 1164 (D.C. Cir., 1990), for the proposition that "Page America has not supplied the critical facts from which the Commission can conclude that . . . Page America [should have] two two-way channels at Meriden." Application for Review at 10. Page America did not maintain two pending applications. We therefore find that the Bureau did have sufficient facts to uphold the grant of a loading study waiver.

[8] Associates also cites the subsequent decision in the *Radio Call* proceeding in which the Commission disposed of Radio Call's Application for Review. *Radio Call Company, Inc.*, 7 FCC Rcd 4450 (1992). Associates contends that the Commission's *Radio Call* decision stands for the proposition that when an applicant files more than one paging application in the same market, but fails to file a loading study demonstrating public need for more than one frequency, the Commission must dismiss all applications that are in frequency conflict with other mutually exclusive applications. While this interpretation is technically correct, it is inapposite to the facts of the present case. In *Radio Call*, the applicant sought a waiver in order to keep several applications unsupported by a loading study on file. Here, Page America kept only one application pending in the market.

[9] Furthermore, we find that Associates has failed to advance any probative evidence showing that Page America engaged in warehousing. The Commission defines "warehousing" as occurring when parties "apply for frequencies which they do not currently need to insure that they will have those frequencies later should they develop a need." *Mobile Radio Service*, 89 FCC 2d 1199, 1202 (1982). Associates submits an engineering exhibit of Page America's Danbury and Hartford, Connecticut, frequency 454.525 MHz facilities that allegedly shows its "intent to warehouse" frequency 454.525 MHz at Meriden, Connecticut, reasoning that no "rational competitor" would apply for a frequency that would be "enveloped" by the interference contours of Page America's facilities in the area. Application for Review at 8. However, we cannot conclude that it is warehousing for Page America to expand a wide-area system at Danbury and Hartford, Connecticut, and dismiss the 454.525 MHz application at Meriden, whereas a warehouser presumably would seek to retain the Meriden application without justification.

hearing because it was a "complex legal proceeding." Application for Review at 13. However, if Section 22.22 of the Rules had been meant to apply to paging applications dismissed after a "complex legal proceeding," such language would have been incorporated. In sum, we cannot find any legal or policy justification for overturning the Bureau's finding that Section 22.22 of the Rules does not apply to the instant proceeding.

10. Lastly, Associates argues that the Bureau has "badly misread" the Commission's *ex parte* rules in holding that the Page America frequency 454.525 MHz dismissal letter did not constitute a rule violation in connection with Associates's allegedly mutually exclusive application. We disagree. The proceeding as to Page America's 454.525 MHz application was not restricted, and Page America was therefore under no duty to serve the letter on Associates as a result of the pendency of Associates's instant application. The only authority Associates has cited in support of its argument is Section 1.1208(c)(1)(i)(C) of the Rules, which provides, in pertinent part, that a proceeding becomes restricted from the time a person has constructive or actual knowledge of a mutually exclusive application. This rule does not apply here because Page America could not have known either constructively or actually that its 454.525 MHz application was mutually exclusive with the captioned Associates frequency 454.600 MHz application because the two applications are not mutually exclusive. Therefore, under the rule the letter is not prohibited, nor does the assertion by Associates that the "letter should have been served upon [it] long ago" make it so.[10] Application for Review at 14. Associates further contends that because the letter "purportedly remov[ed] a fatal defect in the captioned application [it] is absolutely critical to the instant case," and should have been served on Associates as an allegedly mutually exclusive applicant. Associates says that it "has an unqualified right to review" the letter, characterizing the Bureau's finding as "nonsensical." Application for Review at 14-15. However, neither an estimation of its "critical" nature, nor a putative "unqualified right" to it, makes the Page America letter prohibited in connection with Associates's allegedly mutually exclusive application. Accordingly, we uphold the Bureau's conclusion that there was no *ex parte* violation in connection with Associates's status as a purportedly mutually exclusive applicant.[11]

11. In its reply pleading, Associates asserts that it "ha[d] come to [its] attention" that Page America has other two-way paging facilities within a ten-mile area of each other. Reply to Opposition to Application for Review at 2. Associates opines that "[i]t appears that Page America is cavalier about the traffic loading study." *Id.* Section 1.115(c) of the Rules provides that:

> No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Accordingly, we reject this assertion. This allegation has not been presented to the MSD or the Bureau, and is otherwise of questionable relevance to the narrow issues before us.[12]

12. In conclusion, we find that Paging Associates has failed to demonstrate reversible error by the MSD or the Bureau in their decisions below. We therefore affirm the decisions and deny the application for review.

IV. ORDERING PARAGRAPH

13. Accordingly, IT IS ORDERED that the application for review filed by Paging Associates, Inc., involving the captioned proceeding IS DENIED and the actions of the Common Carrier Bureau ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[10] We note that, in an erratum filed on August 28, 1992, Page America provided Associates with a copy of the contested letter, which had been inadvertently omitted from its opposition to the application for review.

[11] We note that Associates does not allege that the *ex parte* rules were violated by reason of its role as a petitioner to deny the 454.600 MHz application, and we do not address this issue.

[12] *See, e.g., Little Rock Radio Telephone Co., Inc.*, 50 Rad. Reg. 2d (P&F) 1535, 1541 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 16-DSS-ML-92

Application for interim orbital assignment of the Galaxy 6 domestic satellite to 103^0 W.L.

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 19-DSS-ML-92 / File No. 20-DSS-MLA-93

Application for interim orbital assignment of SBS-6 to 95^0 W.L.

Application to extend the launch date of the Galaxy 3H hybrid satellite

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1993; Released: June 22, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Hughes Communications Galaxy, Inc. (Hughes) has filed a Petition for Partial Reconsideration (Petition) of the Common Carrier Bureau's Order and Authorization (Order)[1] dismissing without prejudice Hughes's application requesting an interim orbital assignment for its Galaxy 6 satellite at 103^0 W.L. GE American Communications, Inc. (GE Americom) filed comments on the petition. For the reasons discussed below, we grant Hughes's petition.

2. In addition, Hughes and Communications Satellite Corporation (Comsat) have filed a Joint Motion to Vacate in Part and to Modify (Joint Motion) the Bureau's Order denying Hughes[2] authority to locate SBS-6 at 95^0 W.L. on an interim basis.[3] In addition, Hughes requests consent to extend the launch date of Galaxy 3H from January 31, 1994 to December 31, 1995. GE Americom filed comments on this Joint Motion as well. For the reasons discussed below, we grant the Joint Motion, and the request to extend the launch date for Galaxy 3H.

II. BACKGROUND

3. Hughes's C-band Galaxy 6 satellite is operating at 99^0 W.L. on an interim basis until Galaxy 4H is launched into 99^0 W.L. in mid-1993. At that time, Hughes is authorized to use Galaxy 6 as the replacement satellite for Galaxy 2 at 74^0 W.L., which will be retired in late 1993. In late 1991, Hughes filed an application to operate Galaxy 6 at 103^0 W.L. for the interim period between the time Galaxy 4H replaces it at 99^0 W.L. in mid-1993 and the end-of-life of Galaxy 2 in December 1993. The Bureau dismissed this application without prejudice, stating that the 103^0 W.L. location is within that portion of the arc involved in a 1988 trilateral arrangement among the U.S., Canada, and Mexico, and that it would not approve such an assignment without the express consent of the Canadian administration.[4]

4. Hughes's Ku-band SBS-6 satellite is operating at 99^0 W.L. on an interim basis until Galaxy 4H is launched into 99^0 W.L., although it is assigned to 72^0 W.L.[5] In late 1991, Hughes filed an application to relocate SBS-6 to 95^0 W.L. in mid-1993 when Galaxy 4H becomes operational at 99^0 W.L. Hughes wants to operate SBS-6 at 95^0 W.L. until Galaxy 3H is launched into 95^0 W.L. Comsat filed a petition to deny the Hughes request because its subsidiary, Comsat General Corporation (Comsat General), is operating the Ku-band SBS-3 satellite at 95^0 W.L. The Bureau found no reason for SBS-3 to be decommissioned or moved at that time and consequently denied Hughes's request. Since the adoption of the Order, Hughes and Comsat have entered into an agreement in which both parties now support the original Hughes request regarding SBS-6 and the current Hughes request to extend the launch date of Galaxy 3H from January 31, 1994 to December 31, 1995.

III. DISCUSSION

Galaxy 6

5. The Bureau dismissed the Hughes request to operate Galaxy 6 at 103^0 W.L. for an interim period because there was no express consent of the Canadian administration found in the record. The 103^0 W.L. location is within that portion of the orbital arc that is included in a Canadian,

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[1] Hughes Communications Galaxy, Inc., 7 FCC Rcd 7119 (Com. Car. Bur. 1992).

[2] Satellite Transponder Leasing Corporation (STLC) filed the original application requesting an interim orbital assignment of 95^0 W.L. for SBS-6. After the adoption of the Order and pursuant to Commission consent, however, STLC was merged into its parent company, Hughes, and STLC's Commission authorizations were assigned to Hughes. *See* Letter from Hughes to FCC (October 16, 1992). We also take this opportunity to correct a typographical error in the ordering clause contained in Paragraph 22 of the Order that refers to Galaxy 6H instead of Galaxy 7H. The paragraph should read in pertinent part: "... Satellite Transponder Leasing Corporation is authorized to operate SBS-4 at 77^0 W.L. on a non-interference basis until international coordination is completed. The period of operation shall start when *Galaxy 7H* is launched and terminate at the expiration of SBS-4's license term." (Emphasis added.)

[3] We will treat this Joint Motion as a petition for partial reconsideration with respect to the SBS-6 interim orbital assignment request and a launch date extension request with respect to the Galaxy 3H request.

[4] The Bureau granted the unopposed Hughes request to replace Galaxy 2 with Galaxy 6 at 74^0 W.L.

[5] *See* Satellite Transponder Leasing Corporation, 5 FCC Rcd 1651 (Com. Car. Bur. 1990).

Mexican and United States trilateral arrangement reached in 1988.[6] Under the provisions of the arrangement, Canada is permitted to occupy the 104.5^0 W.L. location with a C-band satellite until the 1994 time frame. Now, Hughes claims that Telesat Canada has informed it "that there is no Canadian satellite now at the 104.5^0 W.L. location, and that Telesat Canada has no plans to place one there."[7] Hughes submits a letter it received from Telesat Canada concurring with Hughes's "proposed operational arrangement regarding the temporary assignment of Galaxy VI at 103^0 W.L.[8] Further, in its letter, Telesat Canada agreed to "notify the Federal Department of Communications (DOC) and recommend that they inform the appropriate authorities at the FCC that coordination of Galaxy VI is successfully completed vis-a-vis Anik E-A (107.3^{0}W) satellite system, for its temporary assignment to 103.0^0 W.L."[9]

6. In its reply to the Hughes Petition, GE Americom argues that Hughes has failed to establish any need to locate Galaxy 6 at 103^0 W.L. and that if an interim assignment is permitted, the Commission should prevent Hughes from obtaining any permanent authority to use the 103^0 W.L. orbital location by asserting a need to continue to serve the customers it had acquired during its interim assignment there.[10]

7. Hughes made clear it requested 103^0 W.L. on an interim basis only as a transitional orbit location. While we do not expect Hughes to request regular authority to operate at 103^0 W.L., if it did request such authority, the request would be treated as any other request for an orbital reassignment.[11] Hughes's interim operation at 103^0 W.L. will confer no advantage on it vis-a-vis other applicants that may apply for 103^0 W.L. Moreover, Canada has apparently agreed to the interim assignment.

8. Telesat Canada has stated that it will recommend that the DOC inform the Commission of the successful coordination of Galaxy 6. Thus, we conditionally grant the Hughes application requesting an interim orbital assignment for Galaxy 6 of 103^0 W.L., subject to Commission receipt of actual notice from the DOC that coordination is completed.

SBS-6 and Galaxy 3H

9. The Bureau denied Hughes's request to operate SBS-6 at 95^0 W.L. for an interim period because it saw no reason for Comsat's SBS-3 to be decommissioned or moved at that time. Comsat's petition to deny the Hughes request was central to our decision. In their Joint Motion, Hughes and Comsat note that they have resolved their differences regarding 95^0 W.L. Comsat formally withdraws its Petition to Deny the request that SBS-6 be located at 95^0 W.L.. Hughes and Comsat also request that the Commission extend the launch date of Galaxy 3H from January 1994 until December 31, 1995 to facilitate the transition of Hughes and Comsat customers.

10. Although not formally opposing the Hughes and Comsat Joint Motion, GE Americom argues that the Commission should not permit Hughes to leverage regular authority at 95^0 W.L. from any grant of an interim assignment at that location. GE Americom argues that its concern is that if Galaxy 3H is not launched, Hughes should not be entitled to any priority with respect to a permanent assignment to 95^0 W.L. by reason of having SBS-6 assigned there on an interim basis.

11. In light of the Joint Motion, we permit SBS-6 to be relocated to 95^0 W.L. on an interim basis. As for the delay in the launch of Galaxy 3H, Hughes asserts that it and Comsat agree that a December 31, 1995, launch date of Galaxy 3H would provide the most efficient service to their customers, eliminating the prospect of a potentially disruptive third transition of their existing users. In the past, the Commission has denied launch extension requests where it appears orbital locations are being held by licensees who had not decided whether to proceed with their plans or who did not plan to implement their satellites for many years. Here, however, Hughes states that its request is not "warehousing" because Galaxy 3H, originally authorized as a ground spare, has already been constructed. Hughes further states that if the request is approved, the extension will not delay or defer Hughes's service offering from 95^0 W.L. The accommodation of an efficient transition from two single-band satellites to one hybrid satellite is sufficient reason to grant the launch extension request where, as here, no evidence of "warehousing" is present.

12. With respect to GE Americom's concerns regarding Hughes's ability to use the interim assignment at 95^0 W.L. as leverage for a regular assignment, we note that Hughes has constructed the satellite regularly assigned to that location, Galaxy 3H, and we have no reason to believe that satellite will not be launched. If Galaxy 3H is not launched, we will consider other assignments at 95^0 W.L. on the basis of the facts before us. Therefore, we grant the Hughes and Comsat joint request to locate SBS-6 at 95^0 W.L. on an interim basis and extend the launch date of Galaxy 3H from January 31, 1994 to December 31, 1995.[12]

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[6] *See* Letter from Chief, Common Carrier Bureau, FCC to Senior Assistant Deputy Minister, Government of Canada Department of Communications (August 19, 1988).

[7] Petition at 2 n.1.

[8] *See* Letter from D.E. Weese, Director, Communication Systems Engineering, Telesat Canada to Messrs. Bernard Vecerek and Vu Phan, Galaxy Systems Engineering, Hughes Communications (November 20, 1992).

[9] *Id.*

[10] Hughes filed a Motion to Strike and Response to the GE Americom Reply stating that the Reply was filed after the requisite comment period for petitions for reconsideration. GE Americom filed an Opposition stating that the Petition was merely a re-filed application and that the comment filing periods for applications should apply. We will treat the Hughes Petition as a petition for reconsideration and GE Americom's reply comments as informal late-filed comments and therefore deny Hughes' Motion to Strike.

[11] The 103^0 W.L. location was assigned to GTE Spacenet for a replacement satellite for Spacenet I to be launched in the 1994 time frame.

[12] We also grant Comsat special temporary authority to continue to operate SBS-3 at the 95^0 W.L. location until such time as SBS-6 is ready to become operational at that location and Comsat has transferred its SBS-3 traffic over to the SBS-6 satellite. Also, Comsat states that it has filed an application for an interim orbital assignment of 72^0 W.L. for SBS-3 provided that the Commission grants Hughes an interim orbital assignment of 95^0 W.L. for SBS-6. That application will be disposed of in the appropriate proceeding.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration and Application File No. 16-DSS-ML-92 filed by Hughes Communications Galaxy, Inc. ARE CONDITIONALLY GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to locate Galaxy 6 at 103^0 W.L. temporarily SUBJECT TO the Commission receiving notice by August 1, 1993 from the Canadian Federal Department of Communication regarding the successful coordination of Galaxy 6 and all relevant Canadian spacecraft.

14. IT IS FURTHER ORDERED that the Joint Motion to Vacate in Part and to Modify filed by Hughes Communications Galaxy, Inc. and Communications Satellite Corporation IS GRANTED to the extent that Application File No. 19-DSS-ML-92 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to locate SBS-6 at 95^0 W.L. temporarily and that Application File No. 20-DSS-MLA-93 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to extend the launch date of Galaxy 3H from January 31, 1994 to December 31, 1995.

15. IT IS FURTHER ORDERED that the application for special temporary authority, Application File No. 29-DSS-ML-92 IS GRANTED IN PART AND DENIED IN PART to the extent that Communications Satellite Corporation IS AUTHORIZED to continue to operate SBS-3 at the 95^0 W.L. location until such time as SBS-6 is ready to become operational at that location and Communications Satellite Corporation has transferred its SBS-3 traffic over to the SBS-6 satellite.

16. IT IS FURTHER ORDERED that the Motion to Strike filed by Hughes Communications Galaxy, Inc. IS DENIED.

17. IT IS FURTHER ORDERED that this Memorandum Opinion and Order will be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-45

In the Matter of Reevaluation
of the Depreciated-Original-Cost
Standard in Setting Prices for
Conveyances of Capital Interests in
Overseas Communications Facilities
Between or Among U.S. Carriers

ORDER ON RECONSIDERATION

Adopted: June 1, 1993; Released: June 22, 1993

By the Commission:

I. INTRODUCTION

1. On July 22, 1992, the Commission released a *Report and Order* in the above-captioned proceeding and concluded that the net-book cost standard for the pricing of conveyances of capital interests in overseas communications facilities between or among U.S. carriers should be replaced with market-based pricing.[1] Virgin Islands Tele-Com, Inc. (V.I. Tele-Com)[2] filed a petition for reconsideration of the Commission's order. The American Telephone and Telegraph Company (AT&T) and Telefonica Larga Distancia de Puerto Rico (TLD)[3] filed oppositions to the petition. MCI Telecommunications Corporation, on behalf of itself and its affiliate MCI International, Inc. (MCII) filed a letter in support of V.I. Tele-Com's petition.[4] For the reasons given below, we deny V.I. Tele-Com's petition for reconsideration.

II. BACKGROUND

2. This proceeding was initiated in 1987 by a Notice of Proposed Rulemaking[5] which proposed to change the way conveyances of ownership interests or other capital interests (such as indefeasible rights of use (IRUs))[6] in overseas communications facilities between or among U.S. carriers were priced. The Commission sought comment on whether to replace the use of the net-book cost standard with a more flexible, market-oriented pricing system.[7] Based on the record and our evaluation of the current state of competition in the international facilities market, in July 1992 we decided to replace the net-book cost standard with a market-oriented pricing policy. We found that the net-book cost standard placed an undue burden on facility co-owners which had to bear the risk and expense of building the facilities, but were limited to recouping only the net-book cost of the facility at the time of conveyance. Moreover, the conveyance was usually made to a competitor of the co-owners. We determined that the new pricing policy would apply to conveyances of ownership or other capital interests between or among U.S. carriers which take place after the effective date of the order. We also applied market-based pricing to conveyances of facilities with authorizations which contained a notification that the conveyances were subject to future pricing policy changes.[8] Finally, we provided that the new pricing policy would apply to conveyances which take place after the facilities' ready-for-service date.

III. DISCUSSION

3. In its petition, V.I. Tele-Com first contends that the five-year-old record in the proceeding is stale and therefore provides an inadequate basis for the decision. Specifically, V.I. Tele-Com maintains that, although the *Report and Order* cited a number of significant changes in the international telecommunications facilities market which influenced its decision, the Commission did not afford interested parties an opportunity to comment on these changes. V.I. Tele-Com cites a number of other proceedings which it alleges were terminated because a significant

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[1] Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, CC Docket No. 87-45, 7 FCC Rcd 4561 (1992) (*Report and Order*).

[2] V.I. Tele-Com did not participate in the earlier stages of this proceeding which was initiated in 1987 because it was not established until 1991. V.I. Tele-Com is a wholly-owned subsidiary of Atlantic Tele-Network, Inc. and an affiliate of the Virgin Islands Telephone Corporation. It was organized to provide interexchange service in the U.S. Virgin Islands and as such, anticipates acquiring international transmission capacity. We find that V.I. Tele-Com has shown that it meets the requirements of Section 1.106 (2)(b)(1) of the Commission's Rules, and we accept its petition.

[3] TLD is a facilities-based international carrier based in Puerto Rico and is one of the interexchange carriers serving Puerto Rico and the U.S. Virgin Islands on an equal access basis.

[4] On August 27, 1992, MCII filed a letter commenting on the *Report and Order*, stating that it was concerned that the Commission's assessment of available competitive sources of supply may be "overly optimistic."

[5] Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, *Notice of Proposed Rulemaking*, 2 FCC Rcd 1465 (1987) (*NPRM*).

[6] An IRU interest in a communications facility is a form of acquired capital in which the holder possess an exclusive and irrevocable right to use the facility and to include its capital contribution in its rate base, but not the right to control the facility or, depending on the particular IRU contract, any right to salvage. The IRU is conveyed by a facility co-owner to a carrier that did not elect to become a facility co-owner or that as a facility co-owner did not purchase sufficient capacity to meet its projected demand over the life of the facility.

[7] Net-book cost, also known as depreciated original cost, is the original cost of the capital interest in the facility minus the accumulated depreciation at the time of the conveyance.

[8] For several years, the Commission expressly conditioned grants of Section 214 authorizations to provide that, when any applicant acquires or transfers ownership or IRU interests in these facilities, it must do so at net-book cost or in conformance with such policy as the Commission might develop in the future regarding the price at which IRUs will be made available. *Report and Order*, 7 FCC Rcd at 4563; *see also*, para. 10, *infra*.

amount of time had elapsed since the issuance of the notice of proposed rulemaking with no Commission action.[9]

4. We find that V.I. Tele-Com's argument that the record in this proceeding is stale is not a sufficient basis to reconsider the *Report and Order*. In reaching our decision that the net-book cost standard was no longer suitable and should be replaced, we took into account both the concerns commenters expressed with the standard -- which were not invalidated by the passage of time -- as well as a number of recent Commission actions which fostered competition in the international facilities market and further strengthened the original basis for the proposed rate change.[10] Moreover, as AT&T and TLD note, the *Report and Order* relied on such additional factors as the global connectivity offered by the INTELSAT system, the wider choice of overseas transmission facilities available to U.S. carriers, and the rights of carriers to own and operate earth stations in reaching its decision to replace the net-book cost standard. The *Report and Order* also noted that the adoption of incentive regulation further eliminated the need for net-book cost pricing.[11] V.I. Tele-Com did not argue that any of these actions undermined the proposed policy. Further, the cases cited by V.I. Tele-Com concern situations where the Commission had taken some action which either rendered the pending proceeding moot or made it impossible for the Commission to make a decision based on the current record. Here, the Commission has not taken any action during the pendency of the proceeding that would have had a similar effect.

5. V.I. Tele-Com also argues that, if the Commission decides to maintain its new pricing policy, it should exempt the Caribbean Basin from the new market pricing policy. V.I. Tele-Com alleges that in the past, when the Commission has liberalized its regulation of international services, it has done so on a market by market basis.[12] This is particularly pertinent here, V.I. Tele-Com contends, because the Atlantic region is more competitive than the Caribbean region. MCII agrees with V.I. Tele-Com's assessment of the availability of facilities in the Caribbean.

6. In response, AT&T claims that V.I. Tele-Com's reliance on the *International Services* order is misplaced because that decision has no bearing on pricing for conveyances of capital interests between and among U.S. carriers. AT&T and TLD also maintain that there is competition in the Caribbean basin region for facilities because there are a number of international communications facilities that connect with the Caribbean, such as the TAINO-CARIB Cable System, TCS-1 Cable System, and the Digital Eastern Caribbean Microwave system.[13] Furthermore, Pan American Satellite is authorized to provide services between Western Europe, Central and South America, and the Caribbean. TLD also argues that V.I. Tele-Com incorrectly relies on the number of facilities to make its point. TLD believes a more accurate benchmark of competition is whether the facilities in the Caribbean are owned by monopoly carriers that could control access to them, and maintains that Caribbean facilities are not owned by monopoly carriers.

7. As AT&T and TLD demonstrate, sufficient competition exists in the Caribbean region to justify applying our new market-based pricing policy here. Accordingly, we find that V.I. Tele-Com has not shown a valid basis for excluding the Caribbean region from a pricing policy that we have found should encourage the construction of more facilities because facility owners would have the opportunity to recoup their investment in the facilities at a fair market price.

8. The *Report and Order* states that the owners of a facility must grant requests made by carriers for conveyance of facilities *prior* to the facility's ready-for-service date at net-book cost.[14] V.I. Tele-Com requests that the Commission reiterate this policy to prevent owners from deferring granting requests for conveyances until after the ready-for-service date in order to receive the higher market-based price. AT&T and Telefonica maintain that there is no need for the Commission to clarify its position on this issue because facility authorizations typically contain the requirement that owners of facilities must grant requests by other carriers prior to the facility's ready-for-service date at net-book cost. If a facility owner attempts to defer transfer of the facility until after the ready-for-service date, AT&T and Telefonica maintain that the Commission can take remedial action.

9. We find that V.I. Telecom raises valid concerns about the ready-for-service date, although these concerns lead us to a different conclusion than V.I. Telecom requests. While we agree with AT&T and Telefonica that buyers have recourse if an owner delays the transfer, nonetheless we find there is too much potential for abuse by the facility owner who has inside knowledge of when the facility will be ready-for-service and an incentive to delay the transfer. Therefore, on our own motion, we are eliminating the ready-for-service date as a determining factor for purposes of setting prices.

10. V.I. Tele-Com also argues that if a carrier requested an ownership interest in a facility prior to the effective date of the *Report and Order*, but the transaction took place after the effective date, the carrier should be permitted to acquire the interest at net-book cost. According to V.I. Tele-Com, a carrier should be permitted to rely upon the application of net-book cost if its request was made when the pricing policy was still in effect. We disagree. First, as we state in para. 2, *supra*, most facility owners and buyers were on notice that the conveyance of facilities were subject to any future pricing policy changes. Moreover, in light of our determination that market-based pricing better serves the public interest than net-book cost pricing, we affirm our decision to apply our new policy prospectively. Therefore, the determining factor for purposes of setting prices is the date that a valid contract is consummated for the conveyance of facilities. If the contract was consum-

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[9] V.I. Tele-Com, Application for Review at 3-4.

[10] *Report and Order*, 7 FCC Rcd at 4562 n.9.

[11] *Id.* at 4563.

[12] V.I. Telecom cites as an example our recent action in Regulation of International Competitive Carrier Policies, *Report and Order*, CC Docket No. 91-360, 7 FCC Rcd 7331 (1992) (*International Services*).

[13] In addition, applications for two new cable systems, the AMERICAS-1 Cable System (File Nos. SCL-93-002, ITC-93-030) and the Columbus II Cable System (File Nos. SCL-93-001, ITC-93-029) to serve the Caribbean, among other points, are pending at the Commission.

[14] *Report and Order*, 7 FCC Rcd at 4563 n.19.

mated before the effective date of the *Report and Order* in this proceeding, then the net-book price applies; if after, then market-based prices apply to the transaction.

IV. CONCLUSION

11. For the reasons stated above, we find no merit in V.I. Tele-Com's arguments in favor of either overturning or modifying the Commission's decision. However, on our own motion, we are eliminating the ready-for-service date as a factor in determining which pricing policy applies to a particular transaction.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Virgin Islands Tele-Com, Inc. IS DENIED.

13. IT IS FURTHER ORDERED that our *Report and Order* in CC Docket No. 87-45 is modified as provided in paras. 9 and 10 *supra*, effective 30 days after publication of this order on reconsideration in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-166

In the Matter of

Amendment of Section 73.202(b), RM-8242
Table of Allotments,
FM Broadcast Stations.
(Rexburg, Idaho and
Afton, Wyoming)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 7, 1993; Released: June 22, 1993

Comment Date: August 13, 1993
Reply Comment Date: August 30, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Communicast Consultants, Inc. ("petitioner"), permittee of Station KRXK-FM, Channel 251C3, Rexburg, Idaho, seeking the substitution of Channel 251C1 for Channel 251C3 and the modification its construction permit to specify the higher powered channel. In order to accomplish the upgrade, petitioner also requests the substitution of Channel 254A for Channel 252A at Afton, Wyoming, and the modification of Station KRSV(FM)'s license to specify the new channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 251C1 for Channel 251C3 at Rexburg, Idaho, and Channel 254A for Channel 252A at Afton, Wyoming because this proposal could enable Station KXRK-FM to expand its coverage area. Channel 251C1 can be substituted for Channel 251C3 at Rexburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 32.2 kilometers (20 miles) south of the community.[1] In addition, Channel 254A can be substituted for Channel 252A at Afton, Wyoming at the authorized site of Station KRSV(FM).[2]

3. In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall propose to modify Station KRXK-FM's construction permit without entertaining other expressions of interest in the use of Channel 251C1 at Rexburg, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to the licensee of Station KRSV(FM) at Afton, Wyoming, as to why its license should not be modified to specify operation on Channel 254A in lieu of Channel 252A.

4. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. *See Circleville, Ohio,* 8 FCC 2d 159 (1967). Petitioner has stated its willingness to reimburse the licensee of Station KRSV(FM) for its reasonable costs associated with moving to Channel 254A.

5. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Rexburg, Idaho	251C3	251C1
Afton, Wyoming	252A	254A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Western Wyoming Radio, licensee of Station KRSV(FM), Channel 252A, Afton, Wyoming, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 254A in lieu of Channel 252A.

7. Pursuant to Section 1.87 of the Commission's Rules, Western Wyoming Radio, may, not later than **August 13, 1993,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause.* The Commission may call on Western Wyoming Radio, to furnish additional information. If Western Wyoming Radio, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no H& written statement is filed by the date referred to above, Western Wyoming Radio, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Western Wyoming Radio, P.O. Box 1210, Afton, Wyoming 83110.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

[1] The coordinates for Channel 251C1 at Rexburg are North Latitude 43-32-34 and West Longitude 111-53-07.
[2] The coordinates for Channel 254A at Afton are North Latitude 42-51-02 and West Longitude 110-58-46.

10. Interested parties may file comments on or before **August 13, 1993,** and reply comments on or before **August 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marvin Rosenberg
Kathleen Victory
Fletcher, Heald & Hildreth
1300 North 17th Street
11th Floor
Rosslyn, VA 22209
(Attorney for Petitioners)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-167

In the Matter of

Amendment of Section 73.202(b), RM-8256
Table of Allotments,
FM Broadcast Stations.
(Chillicothe, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1993; Released: June 22, 1993

Comment Date: August 13, 1993
Reply Comment Date: August 30, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Livingston Broadcasting Corporation ("petitioner"), requesting the substitution of Channel 280C3 for Channel 280A at Chillicothe, Missouri. Petitioner also requests modification of its license for Station KCHI-FM, Channel 280A, to specify operation on Channel 280C3. Petitioner submitted information in support of the proposal.[1]

2. We believe petitioner's proposal warrants consideration. Channel 280C3 can be allotted to Chillicothe, Missouri, in compliance with the Commission's spacing requirements at petitioner's specified site.[2] We shall also propose to modify the license for Station KCHI-FM, Channel 280A, to specify operation on Channel 280C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 280C3 for Channel 280A at Chillicothe, Missouri, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Chillicothe, Missouri	280A	280C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 13, 1993,** and reply comments on or before **August 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Steve Mickelson, President
Livingston Broadcasting Corporation
421 Washington
P.O. Box 227
Chillicothe, Missouri 64601

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 280C3 at Chillicothe are 39-45-15 and 93-27-09.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-168

In the Matter of

Amendment of Section 73.202(b), RM-8241
Table of Allotments,
FM Broadcast Stations.
(Lena, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1993; Released: June 22, 1993

Comment Date: August 13, 1993
Reply Comment Date: August 30, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Jane Lucas ("petitioner"), seeking the allotment of Channel 271A to Lena, Illinois as that community's first local aural service. Petitioner states her intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271A to Lena, Illinois, as that community's first local aural service. Channel 271A can be allotted to Lena in compliance with the Commission's minimum distance separation requirements of the Commission's Rules with a site restriction 8.5 kilometers (5.3 miles) south.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lena, Illinois	--	271A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 13, 1993,** and reply comments on or before **August 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jane Lucas
301 South King Street
Mount Carroll, IL 61053
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Com-

[1] The coordinates for Channel 271A at Lena are North Latitude 42-18-27 and West Longitude 89-47-45.

mission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-169

In the Matter of

Amendment of Section 73.202(b), RM-8246
Table of Allotments,
FM Broadcast Stations.
(Walterboro and Ridgeville,
South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1993; Released: June 22, 1993

Comment Date: August 13, 1993
Reply Comment Date: August 30, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gresham Communications, Inc. ("petitioner") requesting the reallotment of Channel 265C3 from Walterboro, South Carolina, to Ridgeville, South Carolina, and the modification of Station WPAL-FM's license to specify Ridgeville as its community of license. Petitioner states that it will apply for the channel, if reallotted to Ridgeville.

2. Ridgeville, population 1,625 persons, is an incorporated community in Dorchester County, population 83,060 persons.[1] Petitioner states that Ridgeville is governed by a town council, has its own police and fire departments, post office, businesses, churches and school. Ridgeville has no local aural transmission service while Walterboro receives local transmission service from FM Station WONO and AM Station WALD. Neither Ridgeville nor Walterboro is located in an Urbanized Area.

3. Petitioner contends that the public interest would be served by granting its petition. Station WPAL-FM currently operates with a directional antenna from a site east-southeast of Walterboro and is unable to provide Ridgeville with a 70 dBu signal. If Channel 265C3 is reallotted to Ridgeville, petitioner states that Station WPAL-FM will be able to relocate its transmitter, operate omnidirectionally, and provide the community with its first local aural transmission service.

4. We believe the public interest would be served by proposing the reallotment of Channel 265C3 from Walterboro to Ridgeville since it could provide the community with its first local FM transmission service without depriving Walterboro of its sole local transmission service. Channel 265C3 can be allotted to Ridgeville with a site restriction of 2.7 kilometers (1.7 miles) west to accommodate petitioner's desired transmitter site.[2] Petitioner does not seek to relocate its station from a rural to an urban community but rather to another rural community and the reallotment could enable Station WPAL-FM to operate omnidirectionally. However, because the petitioner seeks to relocate its transmitter, there will be areas which will lose an existing reception service as well as areas which will gain a new reception service. Therefore, in light of the Commission's expressed concern over the loss of an existing service,[3] we request that the petitioner provide information showing the areas and populations which will receive a new service and the areas and populations which will lose an existing service if Channel 265C3 is reallotted to Ridgeville. In addition, the study should indicate the number of reception services which are now available within the gain and loss areas.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ridgeville, South Carolina	--	265C3
Walterboro, South Carolina	229A, 265C	229A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 13, 1993,** and reply comments on or before **August 30, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III, Esq.
P.O. Box 2506
Pawleys Island, South Carolina 29585
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table

[1] Population figures are taken from the 1990 U.S. Census.
[2] The coordinates for Channel 265C3 at Ridgeville are North Latitude 33-06-00 and West Longitude 80-20-30.
[3] "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." *Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094, 7097 (1990).

of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-46

In the Matter of

Amendment of Section 73.202(b), RM-8187
Table of Allotments,
FM Broadcast Stations.
(American Falls, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1993; Released: June 22, 1993

By the Chief, Allocations Branch:

1. At the request of Dobson, Goss, Rones & Dahl, permittee of Station KOUU(FM), American Falls, Idaho ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 1788 (1993), proposing the substitution of Channel 281C1 for Channel 281A at American Falls, Idaho, and modification of Station KOUU(FM)'s construction permit to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 281C1 for Channel 281A at American Falls, Idaho, as it would provide the community with a wide coverage area FM service. Channel 281C1 can be allotted to American Falls in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.6 kilometers (2.8 miles) southeast at Station KOUU(FM)'s construction permit site.[1] The site restriction avoids a short-spacing to Station KVEZ(FM), Channel 280A, Smithfield, Utah. In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KOUU(FM) to specify operation on Channel 281C1 at American Falls, Idaho.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 6, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
American Falls, Idaho	281C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KOUU(FM), IS MODIFIED, to specify operation on Channel 281C1 in lieu of Channel 281A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dobson, Goss, Rones & Dahl, permittee of Station KOUU(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 281C1 at American Falls are North Latitude 42-45-24 and West Longitude 112-48-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-12

In the Matter of

Amendment of Section 73.202(b),	RM-8151
Table of Allotments,	
FM Broadcast Stations.	
(Galliano and Buras Triumph,	
Louisiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1993; Released: June 22, 1993

By the Chief, Allocations Branch:

1. At the request of Callais Cablevision, Inc. ("petitioner"), licensee of Station KLEB-FM (formerly KBAU-FM), Galliano, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 785 (1993)(*"Notice"*), proposing the substitution of Channel 232C2 for Channel 232C3 at Galliano and modification of Station KBAU-FM's license to specify operation on the higher powered channel. In order to accommodate the upgrade at Galliano, the *Notice* also proposed the substitution of Channel 278A for vacant Channel 231A, or alternatively, the deletion of Channel 231A from Buras Triumph, Louisiana.[1] Petitioner filed comments reiterating its intention to apply for Channel 232C2 if allotted to Galliano. No other comments were received.

2. We believe the public interest would be served by substituting Channel 232C2 for Channel 232C3 at Galliano, since it could provide the community with an expanded coverage FM service. Channel 232C2 can be allotted to Galliano in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Since no comments were received supporting the retention of Channel 231A at Buras Triumph, we will delete the channel in order to accommodate Station KLEB-FM's upgrade at Galliano. As requested, we will also modify petitioner's license to specify operation on Channel 232C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 6, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Galliano, Louisiana	232C2
Buras Triumph, Louisiana	--

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Callais Cablevision, Inc., for Station KLEB-FM, Galliano, Louisiana, IS MODIFIED to specify operation on Channel 232C2, in lieu of Channel 232C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and or upgrade. As a result of this proceeding, Callais Cablevision, Inc., licensee of Station KLEB-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* stated that in the event no expression of interest in retaining the channel at Buras Triumph, Louisiana, was filed, the allotment would be deleted.

[2] The coordinates for Channel 232C2 at Galliano are North Latitude 29-26-00 and West Longitude 90-17-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 9, 1993

CONSUMER ALERT

ACCESSING LONG DISTANCE CARRIERS WHEN YOU TRAVEL

With the vacation season approaching, many consumers will be traveling throughout the country. The Commission would like to remind traveling consumers who wish to use a particular long distance carrier or Operator Service Provider (OSP) that they should contract their carrier of choice for dialing instructions before leaving home. Consumers may utilize access codes to guarantee that they reach their preferred long distance carrier or OSP when using payphones or other telephones available to the public at "aggregator" locations such as hotels, motels, hospitals, resorts, airports, gas stations, campgrounds, and convenience stores.

Three types of access codes can be employed by consumers to access their carrier of choice - "800" and local "950" access numbers or five-digit "10XXX" equal access codes. Federal law requires all aggregators to allow access via 800 or 950 numbers. The Commission has acted to ensure consumers' access to their preferred carrier by requiring pay telephone owners to allow 10XXX access. Other aggregators are phasing in this form of access according to a schedule set by the Commission.

Consumers may have difficulty reaching their carrier of choice from some locations other than payphones, such as hotel or motel room phones, because some of these locations may not currently allow 10XXX access. When this occurs, consumers may access their preferred OSP through the use of 800 or 950 access numbers, which the Commission has required OSPs to establish. The use of 800 or 950 access numbers will provide an access method for consumers where 10XXX access is temporarily unavailable.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Enhanced TeleManagement, Inc.,
Complainant,

v.

Northwestern Bell Telephone Company — File No. E-89-183

and

Pacific Northwest Bell Telephone Company, Defendants. — File No. E-89-184

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 21, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Enhanced TeleManagement, Inc. ("ETM") has filed complaints against Northwestern Bell Telephone Co. ("NWB") and Pacific Northwest Bell Telephone Co. ("PNB")[1] (together the "defendants") alleging that defendants violated Section 201(b) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 201(b), and Section 69.104(a) of the Commission's rules, 47 C.F.R. § 69.104(a), by improperly assessing end user common line ("EUCL") charges on Centrex services and facilities provided to complainant. The defendants have denied the allegations and have moved to dismiss the complaint. The defendants also filed a cross complaint in which they allege that ETM has failed to pay lawful tariffed charges for services obtained from defendants. For the reasons set forth below, we deny ETM's complaint. We also dismiss defendants' cross complaint for failure to state a cause of action.

II. BACKGROUND AND CONTENTIONS

2. The complainant is a reseller of shared Centrex services and of intraLATA and interLATA services, including interstate telecommunications service. Defendants PNB and NWB are local exchange carriers ("LECs") that provide, among other services, interstate switched access and Centrex or Centrex-like services to complainant in their respective Washington/Oregon and Minnesota service areas. Both PNB and NWB provide switched access service pursuant to US West F.C.C. Tariff No. 1.[2] In addition, at all times relevant to the complaint, both defendants participated in the National Exchange Carrier Association ("NECA") F.C.C. Tariff No. 5 with respect to their carrier common line ("CCL") rates.[3]

3. ETM has subscribed to PNB's Centrex service in the Washington and Oregon markets since 1986, to NWB's Centrex service in the Minneapolis and St. Paul markets since 1984, and to NWB's Centrex service in the Duluth market since 1986.[4] Complainant subscribes to conventional Centrex service[5] from defendants, along with certain additional enhancements for long distance call routing. ETM also subscribes to long distance services from various interexchange carriers ("IXCs"), which are terminated at the defendants' Centrex switches at the respective locations, using dedicated LEC special access services. ETM's customers, in turn, are interconnected with these resold long distance services through defendants' Centrex switches by conventional Centrex station lines, that is, by means of common lines between ETM's customers' premises and defendants' serving Centrex central offices. ETM represents that its customers do not enjoy "equal access or 1+ dialing, but instead must dial the conventional level 9 access code in order to be routed to an interexchange trunk group at the centrex switch."[6]

4. Since commencing ETM's Centrex service, defendants have charged, and ETM has paid, EUCL charges, the federal subscriber line charges, for each Centrex station line connected to each of ETM's customers.[7] In 1988 these EUCL charges ranged from $4.51 to $5.89 per month per station line, depending on market and other factors.[8] On a current aggregate basis as of the date of the complaint, ETM's total monthly payments of EUCL charges to defendants for the Centrex lines at issue were approximately $47,000 to PNB and $7,000 to NWB.[9] According to com-

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[1] As a result of a corporate restructuring, Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. were merged into Mountain States Telephone and Telegraph Co. ("MTN"), and MTN was renamed US West Communications Inc. *See* Mountain States Telephone and Telegraph Co., *et al.*, 5 FCC Rcd 1982 (1990). For the sake of convenience, we will continue to refer to the defendants in this Order as NWB and PNB.

[2] Complaint at 1.

[3] *Id.*

[4] *Id.*

[5] "Conventional" Centrex service is a LEC service for business customers that utilizes a portion of the LEC switch and local loops to provide intercom function among Centrex stations and local exchange service. Centrex switches can also be used to route traffic onto interstate access lines, including those used for interstate services (e.g., MTS, WATS, and their equivalents). *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I: First Reconsideration Order, 97 FCC 2d 682, 698 (1983) (hereinafter *First Reconsideration Order).*

[6] Complaint at 3.

[7] *Id.*

[8] According to ETM, its EUCL charges are approximately 450% higher than the traffic-sensitive access charges that its interexchange competitors pay for equivalent access minutes, and that ETM's equivalent total traffic-sensitive ("TS") and non-traffic-sensitive ("NTS") charges are approximately 800% more than those paid by its IXC competitors. *Id.* at 3-4.

[9] *Id.* at 4.

plainant, EUCL charges are collected in lieu of CCL charges on these Centrex lines. Complainant also pays special access charges to defendants for the transmission facilities that it requires to carry its traffic from the Centrex switches in the respective locations to the points of presence of the interexchange carriers whose interstate services it resells.[10]

5. ETM contends that defendants have violated Section 201(b) of the Act by failing to charge what it describes as the "relevant TS switched access rate elements applicable to Centrex-based resellers and, further, by failing to apply the proper non-premium originating NTS CCL charges then in effect."[11] Instead, ETM states, defendants unlawfully charged it EUCL charges for Centrex station lines used for ETM's resold interstate services. ETM states that it is not an end user but an interexchange resale carrier, and, as such, should not have been charged EUCL charges for the Centrex station lines. ETM alleges that it paid "illegally assessed" EUCL charges totaling approximately $1.3 million in the two years prior to its complaint. ETM requests an order by the Commission directing defendants to refund the unlawful charges, offset by appropriate non-premium CCL charges, and enjoining defendants from assessing and collecting further EUCL charges for the services at issue in the complaint.

6. In their answers, PNB and NWB admit that complainant has been a subscriber to their respective Centrex services, and that complainant has been charged the EUCL charges alleged with respect to the Centrex station lines at issue. The defendants, however, maintain that the charges are expressly authorized by Sections 69.104(a) and (d) of the Commission's rules.[12] Defendants also concede that complainant paid charges for special access as alleged but assert as an affirmative defense that they properly assessed the charges because ETM had represented itself as a "shared tenant services provider" by virtue of a record statement made to the Commission in comments filed by ETM in an unrelated Commission proceeding.[13] Defendants point out that the comments filed by ETM specifically stated, *inter alia*, that "ETM is a Centrex-based provider of shared tenant services' ('STS')" and that it was "engaged in the business of providing shared telecommunications services (STS) to small and medium sized businesses in the Seattle/Tacoma, Minneapolis, and Chicago markets."[14] Defendants further allege that "such misrepresentation was made in order to avoid paying the lawful access charges provided for in [defendants'] tariff and required by the Commission's Rules."[15]

7. The defendants also filed a cross-complaint in which they allege that ETM has effectively conceded that it functioned as a common carrier engaged in the provision of resold interstate toll service during the period covered by the complaint. Therefore, defendants argue, ETM should be required to pay restitution to defendants to the extent it failed to pay the proper tariffed charges for access services obtained from defendants to conduct its resale activities.

III. DISCUSSION

8. We have carefully considered the evidence and arguments presented by the parties and conclude, for reasons other than those advanced by the defendants, that ETM has failed to demonstrate that defendants improperly assessed it EUCL charges for the Centrex lines at issue in the complaint.

9. Initially, we note that Part 69 of the Commission's rules provides that the costs of providing exchange access for interstate and foreign services be recovered both from charges imposed directly on end users and from charges assessed on carriers for the use of local exchange facilities.[16] The total revenue requirement associated with the interstate portion of investment in exchange facilities is thus divided into two parts. One part is to be recovered through end user charges and the remaining part is to be recovered through the assessment of carrier charges.[17] These charges, when added together, should recover the total of the interstate portion of the exchange access costs but should not result in over-recovery of those costs.

10. Two of the major goals of the access rules were to provide a fair mechanism for recovering costs of access and to end discriminatory methods of recovering those costs among the various access users.[18] To accomplish these goals, the Commission sought to establish rules under which charges would follow costs without unreasonable discrimination, but also maintained some different rules for carrier charges and end user charges. In general, carrier charges for local switched access services apply equally to facilities-based interexchange carriers and to interexchange resale carriers. Typically, these services are governed by the interstate access tariffs. End user charges, which are also contained in the LECs' interstate access tariffs, apply to all telephone subscribers in payment for their ability to access the interstate, interexchange network. These services are often the same, however, or at least similar in nature, and

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[10] *Id.* at 4-5.

[11] *Id.* at 3.

[12] 47 C.F.R. § 69.104(a) states in pertinent part:

> A charge that is expressed in dollars and cents per line per month shall be assessed upon *end users* that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent they do not pay carrier common line charges.

(Emphasis added.)

47 C.F.R. § 69.104(d) states:

> If the monthly charge computed in accordance with § 69.104(c) exceeds $6, the charge for each local exchange service subscriber-line, except a residential line, a single-line business line, or a line used for Centrex-CO service that was in place or on order as of July 27, 1983, shall be $6.

[13] *See* Comments of Enhanced Telemanagement, Inc. filed on February 29, 1988, in Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange, CC Docket No. 87-530.

[14] Answer at 7, 8.

[15] *Id.* at 8 (footnotes omitted).

[16] *See* 47 C.F.R. § 69.5.

[17] *See First Reconsideration Order*, 97 FCC 2d at 694; *see also* 47 C.F.R. §§ 69.4, 69.5.

[18] *First Reconsideration Order*, 97 FCC 2d at 698.

the Commission has applied end user charges to carriers and carrier charges to customers when necessary for the accomplishment of important policy goals.

11. Interexchange resellers are generally treated as carriers subject to carrier charges, but there are exceptions. Under Section 69.2(m) of the Commission's rules, for example, resellers are deemed to be end users "if all resale transmissions offered by such reseller originate on the premises of such reseller." This provision was included to deal with configurations for resellers such as hotels, which obtain local exchange service for use in making and receiving local and long distance calls, but are considered resellers when they add surcharges to their guests' long distance bills.[19] In these cases, the reseller is treated as an end user and pays the local exchange charges for its local service, including the EUCL charge.

12. The same principle and rule applies here. ETM's Centrex configuration is such that long distance traffic is routed via Centrex common lines terminated at the locations designated by ETM. ETM customers make use of those lines, the local exchange switch, and other local exchange services provided under Centrex to make and receive local and long distance calls. When Centrex customers obtain this service directly, they pay the usual local exchange rates, including the EUCL charge. In such instances, Centrex is treated, for access charge purposes, much the same as a customer-premises PBX. We perceive no basis for a different rule and different rates when a reseller obtains the service to premises that it designates as its own, whether in a single location or to several dispersed locations. In such circumstances, Section 69.2(m) applies and the reseller is deemed an end user. Similarly, if the reseller is obtaining Centrex service for its customers' premises as an agent, the EUCL charge applies to that customer, whether or not the agency agreement makes the customer responsible for the charge. In either event, whether Centrex service is obtained by the customer directly or by a carrier who then resells Centrex to customers, end user charges apply. When, as here, the customer obtains local exchange service using common lines, the rules do not permit evasion of end user charges, even if the customer obtains the service through a reseller.

13. With respect to defendants' cross-complaint, the Commission has previously held that Section 208 of the Act does not authorize the filing of a claim with the Commission for the recovery of damages by a carrier related to carrier charges.[20] Moreover, it appears that end user, rather than carrier, charges were properly applied, as we have already discussed. Defendants' cross-complaint is, therefore, dismissed for failure to establish a cause of action under Section 208 of the Act.[21]

IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons stated above, we find that complainant has failed to establish that defendants violated Section 201(b) of the Act by imposing end user common line charges on ETM for the Centrex station lines at issue.

15. We also dismiss defendants' cross-complaint for failure to state a cause of action under Section 208 of the Act.

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, and 206-208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, and 206-208, and authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complaints ARE DENIED.

17. IT IS FURTHER ORDERED that the cross-complaint filed by the defendants in the above-captioned proceedings IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[19] *Id.* at 711.
[20] Illinois Bell Telephone Co. v. AT&T, 4 FCC Rcd 5628, 5270 (1989), *recon. denied*, 4 FCC Rcd 7759 (1989).
[21] *See* 47 C.F.R. § 1.720.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 16, 1993

CHAIRMAN QUELLO NAMES NEW MEMBER TO ADVANCED TELEVISION SERVICE ADVISORY COMMITTEE

FCC Chairman James H. Quello has announced the appointment of Larry Irving as an Ex Officio member of the FCC Advisory Committee on Advanced Television Service. Mr. Irving, as Assistant Secretary, Communications and Information within the United States Department of Commerce, heads the National Telecommunications and Information Administration. His address is:

Larry Irving
Assistant Secretary, Communications and Information
National Telecommunications &
Information Administration
Department of Commerce
14th & Constitution Ave., N.W.
Washington, DC 20230
(202) 377-1840

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BPET-811118KF

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

Order to Show Cause Why the Permit for KEEF-TV Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870225KE

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BMPCT-870610KU

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. File No. BLET-870610KT

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Special Temporary Authority

DECISION

Adopted: June 11, 1993; Released: June 23, 1993

By the Commission:

1. Before the Commission is the *Initial Decision* (*I.D.*) of Administrative Law Judge Joseph Chachkin (ALJ), 7 FCC Rcd 7819 (1992), which revoked the permit of Black Television Workshop of Los Angeles, Inc. (BTW) to construct a non-commercial UHF television station on reserved channel 68 to serve the Los Angeles, California area.[1] Exceptions to the Initial Decision have been filed by Stephen T. Yelverton, purportedly on behalf of BTW and Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith

[1] In order to expedite this proceeding to the greatest extent possible consistent with due process, we previously directed that Exceptions to the Initial Decision be submitted to the Commission, not to the Review Board. *Order*, 7 FCC Rcd 2716, 2717

Bynum (the "Wade Group")[2] . These Exceptions argue that the *I.D.* should be vacated and BTW, together with the four named individuals, declared the permittees of the facility. Mary V. Woodfork also filed Partial Exceptions to the Initial Decision, contending that the permit should be reinstated and that she should be declared the sole qualified principal of BTW or, alternatively, the individual permittee of the station.[3] Also before the Commission is a plethora of related pleadings, including a Petition for Reconsideration of *Memorandum Opinion and Order*, 7 FCC Rcd 6868 (1992) and a Petition for Reconsideration of *Order*, FCC 92I-094 (released January 14, 1993).[4]

2. This proceeding has a long and convoluted history. BTW was authorized by the Commission to construct the Channel 68 noncommercial television station in 1983, and in early 1987 KEEF-TV began broadcasting. On August 8, 1987, however, the Mass Media Bureau ordered it off the air for operating at variance from the facilities authorized in the construction permit. Also in 1987 a dispute over control of BTW came to the Commission's attention when three of the eight original directors, including Woodfork, submitted informal objections to various BTW applications and requests, arguing that such filings by Wade, purportedly BTW's counsel, were *ultra vires*. Following an investigation, the Commission concluded that the dispute raised substantial and material questions of fact about whether there had been an unauthorized transfer of control of BTW and about BTW's qualifications to be a permittee or licensee. This proceeding was therefore instituted to determine whether BTW's construction permit should be revoked. The issues specified in the *Hearing Designation Order (HDO)*, 3 FCC Rcd 5443 (1988), were, in summary, as follows:[5]

> (a) whether an unauthorized transfer of control of BTW had occurred and, if so, whether the transfer was due to the malfeasance, misfeasance, or nonfeasance of any of the original eight directors, any of the persons now claiming control of BTW, or any other person associated with BTW;
>
> (b) whether any of the aforementioned made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission, or attempted to mislead or deceive the Commission concerning the true ownership and control of BTW;
>
> (c) whether any of the aforementioned violated 47 C.F.R. § 73.3613(b);
>
> (d) in light of the above, whether any of the aforementioned is qualified to be a permittee of the relevant facility;
>
> (e) in light of the above, if it is determined that revocation is not warranted, whether grant of the relevant permit to any of the aforementioned will serve the public interest.

3. After several years of delay,[6] the hearing was held in April and May of 1992, with the ALJ subsequently recommending revocation of BTW's permit. We have carefully reviewed the record and pleadings before us. We adopt the ALJ's findings and conclusions, except as modified herein, and we affirm his decision. Before discussing that conclusion, however, we will address the two Petitions for Reconsideration of ancillary Commission actions that are also before us.

4. *Petition for Reconsideration of 7 FCC Rcd 6868.* By *Memorandum Opinion and Order*, 7 FCC Rcd 6868 (1992) *(MO&O)*, we denied an appeal filed by the Wade Group that challenged an April 29, 1992 bench ruling by the ALJ permitting the testimony of Michele Moore, Esq. during the revocation hearing. We also dismissed an Application for Review filed by Wade of the General Counsel's *Order* which dismissed on procedural grounds Wade's separate *pro se* appeal of the ALJ's bench ruling,[7] concluding that Wade could not simultaneously exercise the right to self-representation and be represented by Yelverton. Yelverton has now filed a Petition for Reconsideration of the *MO&O*

(1992).

[2] The four named individuals claim to be the current directors of BTW. However, whether they in fact represent the corporate entity is one of the core questions at issue. Whether their lawyer Yelverton represents the corporate entity is accordingly also at issue. *See I.D.* at n.1. In response to the ALJ's ruling that Yelverton does not represent the corporate entity, *id.*, Yelverton filed a Notice of Appearance on behalf of BTW on November 30, 1992. Woodfork filed "Comments" on the Notice of Appearance on December 10, 1992, the Wade Group filed a Motion to Strike the "comments" as an unauthorized pleading on December 22, 1992, Woodfork opposed the Motion to Strike on December 28, 1992, the Wade Group filed a Motion to Strike Woodfork's Opposition on February 1, 1993, and Woodfork opposed that Motion to Strike on February 3, 1993. We are dismissing Yelverton's Notice of Appearance as moot, since it is redundant of a Notice of Appearance he filed on November 8, 1988 on behalf of the Wade Group and BTW, as that entity was and is defined by the Wade Group. We are also dismissing as moot the Wade Group's Motion to Strike Woodfork's Comments on the Notice of Appearance and their Motion to Strike Woodfork's Opposition to their first Motion to Strike.

[3] The Exceptions were filed on January 4, 1993, and on January 21, 1993, the Wade Group, Woodfork, and the Mass Media Bureau all filed Replies to Exceptions. On January 25 Woodfork filed a request that the Commission hear oral argument on her Exceptions, and on January 28 the Wade Group also filed a Request for Oral Argument. On January 29 Woodfork filed a Motion to Strike the Wade Group's Request, and on February 3 the Mass Media Bureau filed a Motion to Dismiss the Request. On February 9 the Wade Group filed oppositions to Woodfork's Motion to Strike and to the Bureau's Motion to Dismiss. The parties' views have already been fully delineated in the numerous pleadings submitted in this proceeding and we do not believe that oral argument would serve any useful purpose at this time. In light of that fact and of our earlier decision that the public interest requires expediting this proceeding to the greatest extent possible, *see* note 1 *supra*, we are denying Woodfork's and the Wade Group's requests. Accordingly, we are dismissing Woodfork's Motion to Strike and the Bureau's Motion to Dismiss as moot.

[4] *See also* notes 2 and 3 *supra*.

[5] *I.D.* at ¶ 3.

[6] The delay was precipitated by an application to assign the station's permit under the Commission's minority distress sale policy and various pleadings filed in response to the Commission's action on that application, which was never approved.

[7] FCC 92I-037, released May 14, 1992.

on behalf of the Wade Group.[8] Wade also individually filed a Motion to Stay this proceeding pending judicial review of the *MO&O*.[9] However, the United States Court of Appeals for the District of Columbia Circuit recently dismissed Wade's judicial appeal as "incurably premature," and Wade's Motion to Stay is therefore dismissed as moot.[10]

5. In the Petition for Reconsideration, the Wade Group again contends that Moore provided legal representation to BTW in earlier years and that the attorney-client privilege therefore precluded her testimony concerning BTW during the hearing. Since they fail to make any argument or give any version of the facts that we did not consider in reaching our earlier determination, we deny the Petition to the extent it asks us to deliberate on that matter again. *See WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).[11]

6. We also reject the argument that we erred in upholding the General Counsel's dismissal of Wade's individual *pro se* appeal of the ALJ's ruling permitting Moore's testimony. The Wade Group argues that Wade had a separate right to object to Moore's testimony on the basis of his relationship with several companies other than BTW and Moore's very limited testimony concerning those companies. Though the claim now is that Yelverton does not represent Wade vis-a-vis those named companies, Yelverton has consistently filed pleadings on behalf of both BTW and Wade individually and, prior to the pleadings concerning Moore's testimony, there has been no indication that his representation of Wade was selective. Even the instant pleading contradicts itself on that point. Yelverton continues therein to assert Wade's interests and, most notably, states that during the hearing he was representing Wade "as an individual party" and attempted to stop Moore's testimony by asserting the attorney-client privilege "on behalf of Wade as an individual, ... includ[ing on behalf of] companies controlled by Wade, but separate from Workshop." In light of these facts, and in light of the clear precedent proscribing dual self-representation and representation by counsel, *see* 7 FCC Rcd at 6870 ¶ 6, the request for reconsideration of our earlier decision upholding the dismissal of Wade's *pro se* appeal on procedural grounds must be denied.[12]

7. *Petition for Reconsideration of FCC 92I-094.* By *Order*, FCC 92I-094 (released December 15, 1992), the General Counsel, pursuant to delegated authority, denied a request filed by the Wade Group to expand the page limitation specified in 47 C.F.R. § 1.277(c) for Exceptions to an Initial Decision from 25 pages to 50 pages.[13] The Wade Group has filed a pleading entitled "Petition for Reconsideration" of that *Order*.[14] In fact the pleading is an addendum to their January 4 Exceptions, since seven of the eight pages submitted recite additional Exceptions. The single paragraph challenging the substance of the decision merely raises one of the same arguments previously considered by the General Counsel -- *i.e.*, that the 25-page limit is insufficient to permit discussion of all questions at issue here -- and we agree with the General Counsel that the argument is without merit since the *I.D.* is neither inordinately long nor complex.

8. *The I.D.* As stated, both Woodfork's Exceptions and the Wade Group's Exceptions urge that the ALJ erred in revoking the BTW permit, but each party maintains that it is the legitimate permittee. Woodfork's Exceptions are limited to challenging the ALJ's conclusions concerning her own role in what the ALJ determined to be an unauthorized transfer of control. The Wade Group's Exceptions, on the other hand, challenge almost every finding of fact and conclusion of law, asserting the ALJ erred in relying on the testimony of Woodfork and two other members of the original Board of Directors of BTW and in rejecting as not credible the testimony of Wade's sister Rosa Ware.

9. The basis of the Wade Group's argument that the ALJ erred in relying on the testimony of Woodfork and two other original BTW Board members, Clint Wilson and Roy Campanella, Jr., is essentially that the testimony is unreliable because the witnesses are not "disinterested" parties and because they are hostile to Wade.[15] We disagree. It is within the ALJ's broad discretion in conducting hearing matters to consider animosity in weighing a witness' credibility, but the fact that a witness dislikes a party is clearly not in itself sufficient to require that his testimony be disregarded.[16] In the instant case, the ALJ had ample opportunity to observe the witnesses himself, and the Wade Group had ample opportunity through cross-

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[8] On December 15, 1992, the Mass Media Bureau filed an Opposition to the Petition for Reconsideration and on December 22 the Wade Group filed a Reply.

[9] Wade filed a Notice of Special Appearance for the limited purpose of filing the Motion to Stay. On January 14, 1993 Woodfork filed an Opposition to the Motion to Stay, and the Mass Media Bureau did likewise on January 25.

[10] No. 92-1621, decided March 5, 1993. The Court noted that, in the Petition for Reconsideration filed November 30, Yelverton purports to represent not only BTW but also Wade individually. It thus dismissed Wade's appeal on the grounds that he could not simultaneously seek agency reconsideration and judicial review.

[11] In any event, the Wade Group's arguments on that subject are in essence moot. The ALJ did not rely on Moore's testimony in the *I.D.* except for very limited background information, which information was also provided by other witnesses. *I.D.* at ¶ ¶ 6-8, 10. Likewise, we are affirming the *I.D.* without reliance in a single instance on Moore's testimony.

[12] Even if Wade's appeal had not been dismissed on procedural grounds, it would have failed on its merits. Wade's pleading, like the one filed by Yelverton on behalf of the Wade Group, did not attempt to show that the elements necessary to establish attorney-client privilege are applicable to Moore's testimony. *See also*, note 11, *supra*.

[13] The Wade Group also requested that the deadline for filing Exceptions in the instant case be extended from December 31, 1992 to January 4, 1992. That request was granted.

[14] On January 22, 1993 the Mass Media Bureau opposed the Petition for Reconsideration, and on January 27 Woodfork filed a Motion to Dismiss the Petition, or, alternatively, to strike it. On February 1, the Wade Group filed a Reply to the Bureau's Opposition and an Opposition to Woodfork's Motion to Dismiss. On February 3 Woodfork filed a Motion for Leave to File a Reply Pleading and a Reply to the Wade Group's Opposition, and the Wade Group opposed Woodfork's February 3 motion on February 9. In light of our action herein, Woodfork's Motion to Dismiss, Motion for Leave to File Reply Pleading, and Reply pleading are dismissed as moot.

[15] In a lengthy catalog of Exceptions to specific findings in the *I.D.*, the Wade Group repeatedly asserts that the testimony which served as the basis for the findings must be rejected because it is "uncorroborated, unsupported, and biased" or "self-serving." *See, e.g.*, Exceptions at 58-69.

[16] *WWLE, Inc.* 85 FCC 2d 68 (1971), cited by the Wade Group,

examination to convince the ALJ that their negative view of Wade was so intense that they were not credible. It is clear from the *I.D.* that any such attempts failed; the ALJ explicitly found Campanella's testimony "without question articulate, compelling, and entirely credible" and implicitly reached the same conclusions about Wilson and Woodfork.[17] As we have repeatedly held, his credibility findings are accorded great weight and should not be reversed unless they are patently in conflict with the record evidence.[18] We see no such conflict. The testimony of each of the three witnesses is internally consistent, and, contrary to the Wade Group's contentions, generally consistent with and corroborative of the testimony of each other.[19] Only the testimony of Wade's sister Rosa Ware contradicts that of Woodfork, Wilson, or Campanella in any significant way, and the record supports the ALJ's conclusion that it is Ware, not the other witnesses, whose testimony must be discredited because of her lack of recall and because her testimony is in critical aspects internally inconsistent and/or inconsistent with documentary evidence. *I.D.* at ¶ ¶ 48, 116, n.12, n.15.[20] [21]

10. We turn now to Exceptions addressing the crux of the *I.D., i.e.*, Exceptions charging that the ALJ distorted the factual record and therefore erred when he concluded that an unauthorized transfer of control of the reserved channel 68 permit occurred, *I.D.* at ¶ 125; that misrepresentations were made and/or a lack of candor displayed to the Commission concerning control of the permittee, *id.;* that violations of 47 C.F.R. § 73.3613(b), requiring the filing of pertinent documents, occurred, *id.;* that the eight original members of the Board of Directors, including Woodfork, contributed to the unauthorized transfer of control by failing to exercise their authority, *id.;* that none of the persons or groups named in the proceeding possess the qualifications to be a permittee, *id.* at ¶ 125-128; and that the permit must therefore be revoked, *id.* at ¶ 128. Having carefully reviewed the record, Exceptions, and *I.D.*, we conclude that a preponderance of the evidence fully supports the ALJ's determinations.

11. *Unauthorized Transfer of Control.* Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), prohibits unauthorized transfers of control of Commission permittees

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stands only for the proposition that the ALJ can consider a witness' bias in evaluating his credibility, not for the proposition that a witness must be disqualified if he exhibits any degree of bias. *Id.* at 86 ¶ 27. *Janice Surber*, 5 FCC Rcd 6155, 6158 ¶ 18 (1990), also cited, concerns the admissability of hearsay evidence and is inapposite here.

[17] The Wade Group contends that the ALJ committed reversible error when he refused to accept as rebuttal evidence an affidavit of Charles Eure of Coast TV, which, according to the Wade Group, contradicts Woodfork's testimony. In fact, the affidavit was not offered or rejected as rebuttal evidence. It was attached to one of five motions to enlarge issues against Woodfork filed after the close of the record. The ALJ denied the motion to enlarge, *Memorandum Opinion and Order*, FCC 92M-805, released July 22, 1992, and no timely exception to that ruling has been filed. In any event, having reviewed the affidavit, we conclude that it does not raise questions about Woodfork's credibility.

[18] *See, e.g., Naguabo Broadcasting Co.*, 6 FCC Rcd 912, 919 (Rev. Bd. 1991), *rev. denied*, 6 FCC Rcd 4879 (1991) (subsequent history omitted.)

[19] The Wade Group complains that the Mass Media Bureau did not subpoena certain other witnesses, including former original directors Titilola Payne Parker and Gary Cordell and purported current directors Gwendolyn May and Hope Smith Bynum. *See I.D.* at n.5. They intimate that, if these witnesses had testified, the evidence would have mandated different conclusions. The Wade Group of course could have called these witnesses. In fact, the Wade Group presented no witnesses at all. Having previously foregone the opportunity to rebut the testimony of witnesses who did appear, it cannot now complain that the record does not adequately reflect the circumstances as they occurred. *See Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988), *app. for rev. dismissed*, 5 FCC Rcd 5561 (1990). Furthermore, contrary to another implication in the Exceptions, it is not a routine requirement that the ALJ delay commencement of the rebuttal case or receipt of rebuttal evidence pending review by the lawyers of the transcript of the direct case.

[20] We reject the bare argument that Ware is a party to this proceeding and that, under F. R. Evid. 615(1), the ALJ wrongfully sequestered her when he prohibited counsel from discussing Woodfork's testimony until after Ware testified so that her testimony would not be colored by Woodfork's. Despite several weeks' notice, Ware failed to appear on the day when she had been called to testify, informing the ALJ through counsel that she would not appear unless she was subpoenaed. This last-minute default precipitated a lengthy delay in the proceeding, *see* Tr. at 493-517. Furthermore, it disrupted presentation of the direct case, since the Mass Media Bureau, which had the burden of proceeding with the evidence, had planned to present first the testimony of Wade (who also failed to appear without notice), second the testimony of Ware, and third the testimony of Woodfork. Given these facts, the ALJ's action was within the broad discretion afforded him in conducting hearing matters. *See* 47 C.F.R. § 1.351; 47 C.F.R. § 1.243. As the courts have recognized, F. R. Evid. 615(1), which generally exempts parties from sequestration orders, does not necessarily apply with equal force to individuals testifying at administrative proceedings when the presence of the witness is not necessary for the effective advocacy of the cause as it does to individuals testifying at ordinary civil proceedings. In *NLRB v. Stark*, 525 F. 2d 422, 429-30 (2d Cir. 1975), *cert. denied* 424 U.S. 967 (1976), for example, the court held that the ALJ abused his discretion in *refusing* to sequester individual discriminatees testifying against their employer at an NLRB proceeding, though arguably under Rule 615(1) they could not have been sequestered in a civil proceeding. Noting that the importance of their presence "at every moment" of the hearing did not outweigh the danger that their own self-interest would cause them to shape their testimony according to other testimony they heard, the court held that, absent a "particularized showing of need ... to hear ... other[] evidence," they should have been sequestered. *See also, Caleshu v. U.S.*, 570 F. 2d 705, 711 (8th Cir. 1978). Finally, we note that our resolution of this question is also supported by the fact that, after Ware gave direct testimony, she could have discussed Woodfork's earlier testimony with counsel and refuted that testimony during presentation of the rebuttal case. As noted in note 19, *supra*, Ware did not avail herself of this opportunity.

[21] We also reject the Wade Group's contention that the ALJ "interrupted" and "testified for" Wilson when Wilson was cross-examined about a letter written by his attorney. The record shows that counsel asked a question concerning Wilson's knowledge of a meeting the letter referenced and Wilson answered the question by indicating he wasn't at the meeting and that his second-hand knowledge of what happened there was limited to what was stated in the letter and a telegram he received. Tr. at 1761. Thereafter, the ALJ cut off counsel's plainly repetitious line of questioning. Tr. 1762, 1764. Though the exchange in fact reflects the ALJ's frustration with counsel, his attempt to prevent what he concluded was an effort to harass the witness was clearly within the bounds of his authority. 47 C.F.R. § 1.243; Tr. 1766.

and licensees.[22] As the ALJ noted, a legal or *de jure* transfer of control of a nonprofit, nonmembership corporation such as BTW can occur in several circumstances, including when there is a significant change in the Board of Directors. *I.D.* at ¶ 91. As he also noted, a *de facto* transfer of control of a permittee occurs when those named to the governing board cannot or do not exercise the control with which they have been vested. *Id.* A transfer of control that has been concealed from the Commission through misrepresentation or lack of candor[23] warrants revocation of the permittee's or licensee's authorization. *See, e.g., Silver Star Communications*, 6 FCC Rcd 6905, 6907 (1991).

12. In BTW's case, the initial application and an amendment thereto named eight individuals as the governing body of BTW, and the Commission approved the qualifications of those individuals. The Wade Group, which now claims control of BTW, consists of four individuals -- Wade, Ware, Bynum, and May -- and only one of those, Ware, was in the list of eight approved directors. *I.D.* at n.1, ¶ 3 n.3.[24] The names of Wade, Bynum, and May have never been submitted to the Commission for approval,[25] nor was the Commission kept informed of the departure of the original Board members. *I.D.* at ¶ 55.

13. The Wade Group asserts that such deletion and addition of BTW directors cannot be considered in determining whether section 310(d) was violated because "[t]he FCC has no policy for determining when a transfer of control of a non-stock entity [such as BTW] has occurred." In support of this argument, BTW points out that we have issued a *Notice of Inquiry* (*NOI*) proposing general principles for determining when transfers of control of certain non-stock entities occur.[26] The Wade Group thus apparently believes that, pending completion of the proceeding initiated by the *NOI*, the Commission is without power to enforce Section 310(d) in the case of non-stock permittees or licensees. We reject that suggestion. As the *NOI* makes clear, our current and long-standing policy vis-a-vis non-stock entities is to determine transfer of control issues on a case-by-case basis. 4 FCC Rcd at 3410 n.25. Moreover, even if and when the *NOI* is completed, "we will continue to address [these] issues exclusively on a case-by-case basis" unless the non-stock entity in question has both of two specified characteristics. *Id.* BTW does not have both of these traits[27] and the transfer of control issue would therefore be resolved in any event not on the basis of the *NOI*, but rather based solely on an examination of the facts presented.[28] The facts show that BTW's eight member Board was the purported sole locus of control of the corporation. While they expected guidance from Wade on matters related to BTW's dealings with the Commission, they did not expect nor was it represented to the Commission that Wade or any other individual or entity would oversee their activities or monitor their actions. *See I.D.* at ¶ 30. Changing the locus of control by replacing seven of the eight members of the Board with three new members in itself constituted a *de jure* transfer of control that could not properly be effectuated without Commission approval.[29] Thus the Wade Group has no legitimate claim to BTW's permit.[30]

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[22] Section 310(d) states in pertinent part as follows:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[23] *See I.D.* at ¶ 109, discussing misrepresentation and lack of candor.

[24] It is unclear how and why May and Bynum became associated with BTW. May, Wade's cousin, was purportedly hired as a "contract employee" of BTW in 1984. *I.D.* at ¶ 47. Bynum (formerly Hope Smith), is listed on Mass Media Bureau Exhibit 3, a February 18, 1981, document entitled "Action of Organizer-Incorporator," as a Director and Assistant Secretary of BTW. However, it appears that members of the Board who were approved by the Commission (possibly excepting Ware) were unaware of Bynum's role.

[25] Wade himself was listed only as BTW's counsel. *I.D.* at ¶ 27.

[26] 4 FCC Rcd 3403 (1989).

[27] The entity must (1) have a governing board that directs the operations of the licensee and (2) operate pursuant to a written organizational document that specifies the rights and duties of the governing board and other participants, if any. 4 FCC Rcd at 3404 ¶ 10. The evidence here overwhelmingly supports the ALJ's conclusion that BTW did not operate under any such organizational document. *See* ¶ 16 *infra*.

[28] If the matters considered in the *NOI* in fact had any relevance to BTW, they would, contrary to the Wade Group's argument, support a finding that the changes in BTW's Board constituted a transfer of control. Of the types of non-stock entities described in the *NOI*, BTW is most closely analogous to entities with self-perpetuating Boards, *i.e.* entities where ultimate control lies in the Board, not some oversight group. For those organizations, the *NOI* would treat any changes in Board composition, gradual or abrupt, as a transfer of control, since there is no superior control group. 4 FCC Rcd at 3406 ¶ 22.

[29] The Wade Group cites *Seven Locks Broadcasting Co.*, 94 FCC 2d 899 (1983), for the proposition that the Commission has refused to decide transfer of control questions for non-stock entities because it has "no articulated policy" on the matter. While the Commission did in fact decline to add an unauthorized transfer of control issue against Seven Locks, the question there was very different from the one presented here. In *Seven Locks* a membership body had ultimate control over the governing board. *Id.* at 901 ¶ ¶ 3-4. *But see, Pacifica Foundation*, 41 FCC2d 71, 72 (Rev. Bd. 1973) (Review Board found changes in governing board of non-commercial educational applicant constituted a transfer of control but declined to add a Section 310(d) issue because, *inter alia*, it was unclear what significance the governing board had and there was no indication the entity had acted in bad faith in failing to file for approval of the transfer of control). *Pacifica Foundation* is clearly distinguishable from the instant case because, as noted, BTW's Board purportedly had ultimate control and because, as reflected in ¶ ¶ 21-26 *infra*, BTW made numerous misrepresentations to the Commission.

[30] Citing *Policy Statement, Tender Offers and Proxy Contests*, 59 RR 2d 1536 (1986), the Wade group also contends that the changes in BTW's Board were "gradual" rather than "abrupt" and that this distinction further dictates against a conclusion that an unauthorized transfer of control occurred. However,the *Policy Statement* is inapposite. While we did in fact there conclude that gradual changes in the Board of a stock company may not under certain circumstances constitute a transfer of control requiring Commission approval, even if eventually a majority of the Board changes, we based that conclusion on the fact that, in stock companies, it is generally the members or shareholders who have ultimate control of the corporation. *Id.* at 1545 n.40, *citing Storer Communications, Inc.*, 57 RR 2d 1651 (1985), *aff'd* 763 F. 2d 436 (D.C. Cir. 1985). In *Storer*, as well as in *WWOR-TV*, 6 FCC Rcd 193 (1990), which are both also cited

14. In any event, we agree with the ALJ that the record shows Wade himself, not the original Board or the "reconstituted" Board that now claims authority, unilaterally exercised *de facto* control of BTW from shortly after the grant of the permit, if not well before, thus providing a separate ground for concluding that section 310(d) has been violated.[31] While the Wade Group argues that literally all of the ALJ's factual findings underlying this conclusion are "reckless," "absurd," and contradicted by the evidence, it is the Wade Group's version of events that is baseless. *See* ¶ 9 and n.19, *supra*.

15. The ALJ's key findings can be summarized as follows: that Wade was motivated to control BTW by his plan to establish a for-profit production company that would sell programming to BTW's station, *I.D.* at ¶ 27;[32] that he "handpicked" directors who, with one exception, knew little about broadcasting and would likely defer to his expertise, *I.D.* at ¶ ¶ 13, 18, 30; that he purposefully frustrated the efforts of other directors to further BTW's interests, *I.D.* at ¶ ¶ 31-36; that he prevented the directors from properly organizing by withholding by-laws from them, *I.D.* at ¶ ¶ 37-40; that without by-laws establishing terms of office, he forced the ouster of Board members at will and orchestrated a May 1984 meeting wherein the election of new Board members was voided,[33] Wilson was removed as Chairman, and Ware was "elected" acting Chairman, *I.D.* at ¶ ¶ 39-40, 44-47, 49-54; that shortly thereafter, with an active Board consisting only of Ware and Woodfork,[34] Wade began to run Board meetings himself and to inform Woodfork about BTW's affairs on a "need-to-know" basis, *I.D.* at ¶47-48, 55-56, 74; that he subsequently held himself out in various meetings and documents, including certain FCC filings, as a Vice President and Director of BTW, though he was not elected to those positions, *I.D.* at ¶ ¶ 61-68, 82; that he took numerous significant actions on behalf of BTW without first obtaining the consent of Woodfork, including, *inter alia*, attempting to amend the articles of incorporation, entering into a loan agreement that pledged BTW's assets as collateral, and applying for an extension of BTW's construction permit, *I.D.* at ¶ ¶ 62, 71, 73; that he controlled BTW's finances through Ware, whom he had earlier appointed Treasurer, to such an extent that Ware and Wade cosigned checks payable to Wade when there was no documentation of his expenses, *I.D.* at ¶ ¶ 28-29, 65, 75-79; that a friend of Wade's, with no connection to BTW, sometimes signed Ware's name to checks, *I.D.* at ¶ 78; and that, when Woodfork finally challenged Wade's actions, he notified her that her term as a BTW director had expired, as he had done with other Directors in the past, *I.D.* at ¶ ¶ 79-81.[35]

16. The Wade Group's seriatim attack on these findings is contradicted in every material respect by the record. They contend that the ALJ's finding that Wade was motivated to control BTW by his plan to establish a for-profit production company was based only "on Campanella's uncorroborated and not disinterested testimony," but in fact Campanella, Wilson, and Duncan all gave supporting testimony.[36] Tr. at 1617, 1700-1702, 1504-1505. Concerning the finding that Wade constantly frustrated the efforts of other Directors, they argue that Wade cannot be faulted because he had no duty to assist. This position is in itself questionable, given Wade's role as attorney and "business agent" to the corporation. In any event, it ignores extensive record evidence that Wade's repeated failure to cooperate with Directors he himself had selected was key to their ultimate disillusionment with BTW and to Wade's ability to oust them without significant challenge. *I.D.* at ¶ ¶ 40, 53-54. The Wade Group also disputes that Wade withheld by-laws from the Directors and thus prevented them from properly organizing, arguing alternatively that the Directors knew by-laws were not necessary for them to function[37] and that, in any event, he presented by-laws to them as early as 1984. However, virtually all of the Directors who testified except Ware indicated frustration at Wade's repeated refusals to present by-laws outlining their responsibilities, and Ware's testimony that Wade distributed by-laws at a 1983 meeting was specifically found unbelievable for at least three separate reasons. *I.D.* at ¶ ¶ 37-40 and n.12.[38]

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by the Wade Group, our decisions that changes in Board members constituted insubstantial changes in control requiring approval only on a modified short-form or short-form application, were likewise premised on the fact that shareholders held ultimate control of the relevant corporations.

[31] The Wade Group complains that the ALJ erred in finding that Wade exercised control of BTW during the application and pre-grant period because, while the *HDO* specified an issue as to control of the *permittee*, it did not refer to the *applicant* or specify a real-party-in-interest issue. It is unnecessary to address this question, since Wade's exercise of control over BTW is clearly established without reference to pre-grant activities.

[32] Wade also planned to sell programming to a network of low-power stations he hoped to establish. *Id.*

[33] The meeting was attended only by Wade, Woodfork, Ware, and Payne.

[34] The Wade Group states in Exceptions that Payne left the Board in August 1984. *See also*, *I.D.* at ¶ 55 n.17.

[35] Woodfork attempted to bring in an outside party to examine the books, which Wade prevented. *Id.*

[36] The Wade Group correctly points out that the ALJ erred in finding that, of the original eight directors, only Duncan and Pate knew each other. *I.D.* at ¶ 13. Duncan and Campanella also knew each other. Tr. at 1544. This point is not decisional.

[37] In support of this contention, the Wade Group correctly points out that the Board did not adopt by-laws drafted by Duncan and that an outside attorney who Wilson asked to help find Wade's by-laws did not draft new by-laws for adoption. However, the record reflects that Duncan's by-laws were not adopted in large measure because Wade, BTW's attorney, ignored them. *I.D.* at ¶ 31. It also reflects that Wilson did not ask the outside attorney to draft by-laws because he was confused about the implications of operating under new by-laws when Wade said by-laws already existed, not because he thought they did not need by-laws. *I.D.* at n.11.

[38] The Wade Group claims that a June 14, 1984 letter from Wilson's attorney to Woodfork, Wade, Parker, and Ware confirms that the by-laws were presented at an earlier Board meeting. However, the letter reflects only that the attorney was told by an unidentified source -- possibly Wade himself -- that by-laws existed. Specifically, the letter states that, under California law, it "is very important that the books and records of a corporation be maintained at the principal place of business so that they are easily accessible to officers, directors, and others who are legally entitled to review them. There can be no doubt that ... Mr. Wade ... maintained control over the by-laws, refusing to deliver them after numerous requests." Thus, to the extent the letter supports any witness' testimony, it supports that of Woodfork, Campanella, and Wilson, not Ware.

17. Concerning the ALJ's finding that the absence of by-laws establishing terms of office permitted Wade to remove Directors at will, the Wade Group submits that the Directors agreed to certain staggered terms of office. Campanella, Pate, Woodfork, and Duncan, testified to the contrary, and Wilson testified only that Wade may have told him he had a limited term. *I.D.* at ¶ ¶ 16, 18-20, 40. They also contend that it was Wilson, not Wade, who informed Campanella, Pate, and Duncan that their terms had expired, that Pate and Duncan declined to seek reelection, that Campanella, though reelected, later "voluntarily resigned," and that Wilson also "voluntarily resigned" after Woodfork, Ware, and Parker removed him as Chairman. But the record clearly shows that Wilson notified Campanella, Pate, and Duncan of their expired terms only at Wade's direction. *I.D.* at 39. Furthermore, while it is true that Pate and Duncan decided not to seek reelection because, at least in Pate's case, BTW's lack of organization was too frustrating, it grossly distorts the record to say that Campanella and Wilson "voluntarily resigned." As noted, Wade himself orchestrated the May 1984 meeting where Campanella's reelection was voided and Wilson was removed as Chairman, and Wilson subsequently received a telegram notifying him that he had been removed from the Board altogether. *I.D.* at ¶ ¶45 -46, 50-52. Thereafter, Wilson and Campanella did in fact execute a formal agreement whereby they agreed to "resign" in exchange for an indemnification agreement from BTW. *I.D.* at ¶ 53. Given the preceding circumstances, such action hardly constituted "voluntary" resignations.

18. Concerning Wade's control of BTW's finances, the Wade Group contends that, after the Board was reduced to Ware and Woodfork, they named Wade General Manager and that money Wade received was only reimbursement for his moving expenses and living expenses while acting as General Manager. They argue that Woodfork and Ware agreed to make such payments to Wade, that Woodfork agreed that Ware and Wade could co-sign the checks, and that Wade's friend Arlene Stevens also had authority to sign checks. However, there is no evidence in the record that such financial arrangements existed other than the unreliable testimony of Ware. *See* ¶ 8 *supra*. Contrary to the Wade Group's claim, Woodfork's testimony does not indicate that she ever agreed to reimbursement payments to Wade or that she approved Ware and Wade as co-signatories.[39] Furthermore, Ware admits that, though she consented to Stevens signing checks for her, there was never any Board action approving Stevens as a signatory, that nonetheless Stevens and Wade often co-signed checks, and that Wade was not required to submit any documentation before receiving funds. Tr. at 1047-1049, 1121-1122, 1231-1232. Thus even Ware's testimony indicates that Wade in essence controlled BTW's finances.

19. Finally, the Wade Group argues that actions cited by the ALJ as evidence of Wade's control of BTW after the Board was reduced to Woodfork and Ware were actions legitimately taken in his capacity as General Manager. It notes that Woodfork and Ware told Wade to do whatever was necessary to make the station operational, that he did not need Commission authorization to act as General Manager, and that, as General Manager, he could conduct the day-to-day operations of BTW without raising transfer of control issues. Citing *David A. Davila*, 6 FCC Rcd 2897 (1991), it concludes that there was merely a permissible "delegation of authority" from the Board to him.

20. The reliance on *Davila* is misplaced. That case indicates only that an agent or employee can conduct the daily affairs of a station "if guided by policies set by the ... permittee." *Id.* at 2899 ¶12 . Assuming Woodfork and Ware could legitimately establish station policy as the only surviving directors of BTW, it is clear from the record that they did not do so. Rather, Wade did. Other Board members testified that both Woodfork and Ware were under Wade's control even in earlier times. *I.D.* at ¶ ¶ 40, 52. Woodfork readily admits that she was under Wade's control until approximately September 1986. *I.D.* at ¶ 52, and Ware's actions demonstrate her lack of independence from him. *See I.D.* at ¶ 44 n.14, ¶ 76. Through Ware, Wade had control of BTW's finances, and, given Woodfork's and Ware's deference to him, he was able to make virtually unrestricted decisions on behalf of BTW. The record thus presents not an instance of "delegation of authority," but a classic example of an unauthorized transfer of *de facto* control in violation of 47 U.S.C. § 307(d). *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981), *citing WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd* 20 RR 2d 2052 (D.C. Cir. 1970.) This transfer of *de facto* control, as well as the transfer of *de jure* control discussed *supra*, warrants revocation of the BTW permit if the transfer was intentionally concealed from the Commission through misrepresentation or through a lack of candor, including evasion or a failure to be forthcoming.[40]

21. *Misrepresentation/Lack of Candor; Section 72.3613(b) Violations.* We agree with the ALJ that in this case "the record is replete with instances" in which documents filed with the Commission contain misrepresentations and/or display a lack of candor concerning who was in control of BTW. *I.D.* at ¶ 110.[41] Specifically, the evidence shows that documents were filed on behalf of BTW that (i) misrepresented that Board members had performed certain duties or authorized certain acts they did not in fact perform or authorize, (ii) until March 1985, did not disclose Wade's own role in BTW's affairs as anything more than that of

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[39] Her testimony indicates that she was aware of their authority to sign checks and that she ultimately asked Wade and Ware if she too could have signatory authority. They agreed in order "to appease" her. Tr. at 642.

[40] *See Silver Star Communications*, 6 FCC Rcd 6905, 6907 ¶ 20 (1991). *See I.D.* at ¶ 109, discussing misrepresentation and lack of candor.

[41] In addition to specific complaints concerning the ALJ's conclusions on the issue of misrepresentation/lack of candor, the Wade Group argues generally that the ALJ failed to support his conclusions with citations to the record, that there was no evidence of Wade's intent to deceive since Wade never testified and his state of mind could therefore not be ascertained, and that the conclusions were based on Woodfork's testimony, which was not credible. These contentions are without merit. The ALJ's conclusions on the misrepresentation/lack of candor issue (*I.D.* at ¶ ¶ 109-118) are based on his preceeding findings of fact (*I.D.* at ¶ ¶ 6-88), which are amply supported by references to the record. Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here. *See Calf. Public Broadcasting Forum v. FCC*, 752 F. 2d 670, 679 (D.C. Cir. 1985); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1100 (Rev. Bd. 1982). Concerning Woodfork's credibility, *see* ¶ 9 *supra*.

legal advisor to BTW[42] and (iii), after that time, misrepresented Wade as an officer and director of BTW when in fact he had no legitimate claim to those titles. We further agree that the record demonstrates that in several instances the necessity of filing corporate documents was disregarded altogether in violation of 47 C.F.R. § 73.3613(b). *I.D.* at ¶ ¶ 119-120.

22. The ALJ points to BTW's November 1981 application as the first example of a BTW document filed with the Commission that contained various misrepresentations. Again putting aside the question of whether the Board of Directors represented in the application as the corporation's governing body in fact had any authority over the corporation *ab initio*,[43] it is clear that, at a minimum, the application misrepresents the Board's role in preparing and authorizing the filing of the application. *I.D.* at ¶ ¶ 16-19. We reject the Wade Group's contrary position.[44] Similar misrepresentations were made in at least three subsequent documents, an August 25, 1986 Application for Extension of Construction Permit, a March 1985 Ownership Report, and an August 25, 1986 request for extension of time. *I.D.* at ¶ ¶ 73, 112, 115.

23. The ALJ also points to various documents filed with the Commission wherein individuals were listed as officers who in fact were not elected as officers but were instead "appointed" by Wade. *I.D.* at ¶ ¶ 22, 28-29, 111-112. The Wade Group objects to the ALJ's characterizing these listings as "misstatements," arguing that Wade thought he had authority as BTW's incorporator to appoint officers, p, that the "officer's" names were therefore submitted to the Commission "in good faith," and that no misrepresentation was involved since the filings did not specify whether the individuals were "elected" or "appointed." This position, however, is not only unsupported by the record,[45] it is without logic. If Wade's authority over BTW as incorporator was in fact so great as to permit him to appoint all of BTW's officers and directors indefinitely, that fact in itself is strong evidence that Wade had control of BTW's affairs and that his qualifications to be a Commission permittee should have been submitted for approval instead of, or at least together with, those of the eight individuals on whose qualifications the Commission did pass.

24. The Wade Group likewise contends that there was no misrepresentation when Wade submitted his own name on 1985 and 1987 Ownership Reports as an officer and director because he believed "in good faith" that he held those positions at the time. However, documents purportedly executed by or on behalf of Ware and Woodfork belie this contention. In a May 18, 1985 Ownership Report, giving information effective as of January 14, 1985, Wade represented himself as BTW's Vice President. *I.D.* at ¶ 113. Yet, the record contains a corporate resolution dated almost eight months after the effective date of the information in the Ownership Report and signed by Ware and Stevens, supposedly for Woodfork.[46] By the resolution, Wade was "elected" Vice President. *I.D.* at ¶ 64. We agree with the ALJ that the resolution in itself appears to be a fabrication. *I.D.* at ¶ ¶ 65, 113. In any event, the fact that Wade's sister and his friend found it necessary to execute a document electing Wade as BTW's Vice President in September 1985, makes it unlikely that Wade legitimately believed he held that position eight months earlier.[47] Likewise, an April 1, 1987 Ownership Report, effective November 18, 1985, lists Wade as CEO, Executive Vice President, and Director of BTW. Yet, the purported minutes of a BTW Board meeting held one day after the effective date of the Ownership Report show Wade elected to those positions during that meeting. Assuming the minutes are legitimate -- and again we agree with the ALJ that they appear not to be[48] -- they attempt to legitimize information that was represented to the Commission as already being true and thus further undermine the contention that, when Wade submitted the information, he did so in good faith.

25. Finally, the Wade Group disputes the ALJ's findings concerning BTW's by-laws and his conclusion that Wade's representation in a 1987 pleading that he executed the by-laws in 1981 constituted an additional instance of misrepresentation. *I.D.* at ¶ ¶ 86-87, 116. They claim that, as incorporator, Wade had the power to draft BTW's by-laws and no reason not to do so. They point out that the language of the by-laws tracks that of a 1985 Amendment to the Articles of Incorporation that was submitted to the Commission,[49] a fact they believe contradicts the ALJ's conclusion that the by-laws were prepared in 1987. They also again contend that the ALJ's adverse conclusion ignores contrary evidence in a letter from Wilson's attorney to the Board. But nothing the Wade Group argues lends support to their ultimate conclusion; *i.e.*, that Wade in fact prepared the by-laws in 1981. Wade may have had the authority to draft BTW's by-laws, but, as the ALJ correctly concluded, he had ample reason not to do so, *see I.D.* at ¶ ¶ 99-105; the fact that the purported by-laws track language in a 1985 Amendment that was returned by the Commission as procedurally defective does not establish whether

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[42] On March 18, 1985, Wade filed an Ownership Report identifying himself as BTW's Vice President. *I.D.* at ¶ 62.

[43] *See* n.31, *supra*.

[44] Ware's testimony is very clear that, despite the representation in the application that it was prepared under her direction, she had no involvement in its preparation at all and assumed Wade and his staff "in Washington" put it together. Tr. at 954-965. Concerning authorization to file the application, the Wade Group correctly points out that Woodfork's and Campanella's testimony about whether they gave verbal authorization is ambiguous. *See* Tr. at 529; 1407. However, BTW's application specifically represents that they were part of a majority of Board members who gave written authorization for Ware to file the application, and Campanella's testimony on that point is clearly to the contrary. Tr. at 1407-1408. Likewise, Pate, whose name was also listed in the application as one who gave written authorization, clearly denied doing so. *I.D.* at ¶ 19.

[45] Mass Media Bureau Exhibit 3, a document entitled "Action of Organizer-Incorporator," indicates only that Wade could appoint *interim* officers and an *initial* slate of directors, whose terms would expire at "year end 1981."

[46] Woodfork denies that she authorized Stevens to sign the document for her. *I.D.* at ¶ 65.

[47] The Wade Group argues that the corporate resolution was "only cumulative" to previous "oral authorizations" for Wade to act as an officer of BTW. They contend that Ware and Woodfork authorized Wade as General Manager to do whatever was necessary to get the station operational, and that such authorization carried with it the right for Wade to hold himself out as an officer of BTW. However, the record shows that Woodfork did not intend to give him that right, and that she publicly rebuked Wade on at least one occasion for representing himself as an officer when he had not been so elected. *I.D.* at ¶ 58.

[48] *I.D.* at ¶ ¶ 68-69, 114.

[49] The Amendment was returned for procedural reasons.

the by-laws existed in 1981; and, as we have already concluded, the letter from Wilson's lawyer does not, as the Wade Group would have the Commission believe, concede that by-laws were presented to the Board in 1984. *See* note 38 *supra*. To the contrary, the evidence is overwhelming that no by-laws existed until long after all members of the original Board except Ware were ousted.

26. In addition to the misrepresentations concerning BTW's elusive by-laws and the misleading information in BTW's original application, subsequent applications, and haphazard Ownership Reports, the failure to file certain corporate documents as required by 47 C.F.R. § 73.3613(b) further obscured the true nature of BTW from the Commission. *I.D.* at ¶ ¶ 11, 62, 72, 119-120.[50] Without reaching the question raised by the Wade Group of whether the section 73.3613(b) violations are sufficient in themselves to warrant revocation of BTW's permit, we conclude that the record evidence, taken as a whole, clearly and amply supports the ALJ's conclusion that the unauthorized transfer of control of BTW from the original Board to Wade was intentionally concealed from the Commission by Wade and that, absent mitigating circumstances, the BTW permit must therefore be revoked.

27. Woodfork argues in her Exceptions to the *I.D.* that indeed mitigating circumstances exist; *i.e.*, that she is one of the eight original directors to whom the permit was granted, that she did not actively or knowingly participate in Wade's usurpation of control over BTW, that she subsequently made "hurculean" efforts to bring Wade's unauthorized activities to the Commission's attention, and that therefore the permit should be awarded to her alone. While we strongly commend Woodfork's determination to see that neither Wade nor the Wade Group retains wrongful control of BTW, we also agree with the ALJ that Woodfork too must bear responsibility for the events that transpired. *I.D.* at ¶ ¶ 125-131.[51] We do not find that Woodfork affirmatively worked to further Wade's plan.[52] However, her utter passivity and willingless to be manipulated by Wade, even when his activities went far beyond the scope of what the Commission and directors had originally been told they would be, clearly facilitated Wade's efforts to exercise control over the 4 corporation. *See, e.g., I.D.* at ¶ ¶ 42, 52, 56, 59, 73, 74, 112, 115. *Cf. United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832 (1975), *recon. denied*, 60 FCC 2d 816 (1976) (renewal denied based on licensee's abdication of responsibility).

28. We agree with Woodfork that the public interest would have been served by the initiation of a minority-controlled, minority-oriented noncommercial television station in Los Angeles. We also note Woodfork's assertion that, because of a freeze on the acceptance of new applications for television construction permits in Los Angeles, new filings from other applicants for permission to use reserved Channel 68 will not be accepted in the foreseeable future. However, even assuming that such a result will follow, it is fundamental that authority to use the frequency could be given to one of the parties now before us only if the party were qualified to be a Commission licensee, and that is not the case. The group of eight directors to whom BTW's permit was entrusted, including Woodfork, completely abdicated their responsibilities, allowing Wade to take over the corporation for his own purposes with relatively little resistance. Nor does the Wade Group have any legitimate claim to hold BTW's permit. *See* ¶ ¶ 11-13 *supra*. Thus the ALJ correctly concluded that none of the parties to the proceeding has the requisite qualifications to be a Commission permittee and that the permit must be revoked.[53]

29. ACCORDINGLY, IT IS ORDERED, That the Exceptions to *Initial Decision*, 7 FCC Rcd 7819 (1992), filed on January 4, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

30. IT IS FURTHER ORDERED, That the Consolidated Partial Exceptions to *Initial Decision*, 7 FCC Rcd 7819 (1992), filed on January 4, 1993 by Mary V. Woodfork ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

31. IT IS FURTHER ORDERED, That *Initial Decision*, 7 FCC Rcd 7819 (1992) IS AFFIRMED, and the construction permit for 5 Noncommercial Educational Television Station KEEF-TV, Los Angeles, California, held by Black Television Workshop of Los Angeles, Inc. (File No. BPET-811118KF) IS REVOKED.

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[50] Concerning the Wade Group's argument that the section 73.3613(b) violations are not relevant to its qualifications because there was no intent to deceive, *see* note 41 *supra*. The Wade Group also contends that the ALJ erred when he found that BTW was required to file a "Financing Statement" between BTW and lender Harold Ricks because the document evidenced that Ricks had a possible future interest in BTW. *I.D.* at ¶ 120; Mass Media Exhibit 20. We agree with the ALJ that the use of BTW's assets, including FCC permits, as security for a loan did in fact give Ricks a possible future interest in such authorizations and therefore the Ricks/BTW agreement should have been filed with the Commission. We further note that such security interests have been found impermissible. *See Kirk Merkley*, 94 FCC 2d 829, 830 (1983).

[51] Citing a separate statement by Member Blumenthal in *Mark A. Perry*, 4 FCC Rcd 6500, 6505 (Rev. Bd. 1989), Woodfork contends that her conduct should be excused because she was merely following the lead of a "respected attorney." However, Member Blumenthal's comment represents an exception to the general rule that the attorney is the client's agent and the client thus cannot escape responsibility for the inappropriate action or inaction of his attorney. *See e.g., id.* at 6502-6503 and cases cited therein.

[52] Woodfork's Exceptions complain that the ALJ wrongly found that she "knowingly" or "actively" aided Wade in his impermissible activities. We do not share this interpretation of the *I.D.*, but if in fact it might be read to imply that Woodfork approved and affirmatively worked to further Wade's scheme, we agree that no such implication is warranted.

[53] The Wade Group claims that the BTW permit cannot be revoked because the corporate entity was not named as a party in the *HDO*. However, on its face the *HDO* Orders BTW to show cause at hearing why its permit should not be revoked. *HDO* at ¶ 3. The Wade Group also argues that the ALJ precluded BTW from having "counsel to appeal" revocation of its permit when he concluded that Yelverton does not represent the corporate entity, *see* note 2 *supra*. In fact, BTW as a legitimate corporate permittee approved by the Commission no longer exists. *See* ¶ 13 *supra*. However, the interest of each faction now claiming the right to hold the BTW permit --Woodfork on the one hand and the Wade Group on the other -- has been adequately represented here by counsel.

32. IT IS FURTHER ORDERED, That the Applications of Black Television Workshop of Los Angeles, Inc. for license to cover construction permit (File No. BLET-870225KE), for consent to modify construction permit (File No. BMPCT-870610KU), for license to cover construction permit (File No. BLET-870610KT), and for special temporary authority ARE DISMISSED.

33. IT IS FURTHER ORDERED, That the Notice of Appearance filed by Stephen T. Yelverton on November 30, 1992 IS DISMISSED as moot.

34. IT IS FURTHER ORDERED, That the Petition for Reconsideration of *Memorandum Opinion and Order*, 7 FCC Rcd 6868 (1992), filed on November 30, 1992 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

35. IT IS FURTHER ORDERED, That the Motion to Strike Comments of Mary V. Woodfork filed on December 22, 1992 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DISMISSED as moot.

36. IT IS FURTHER ORDERED, That the Notice of Special Appearance and Motion to Stay filed on January 8, 1993 by Booker T. Wade, Jr. IS DISMISSED as moot.

37. IT IS FURTHER ORDERED, That the Petition for Reconsideration of *Order*, FCC 92I-094, filed on January 14, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

38. IT IS FURTHER ORDERED, That the Request for Oral Argument filed on January 25, 1993 by Mary V. Woodfork IS DENIED.

39. IT IS FURTHER ORDERED, That the Motion to Dismiss Petition for Reconsideration filed on January 27, 1993 and the Motion for Leave to File a Reply Pleading filed on February 3, 1993 by Mary V. Woodfork ARE DISMISSED as moot.

40. IT IS FURTHER ORDERED, That the Request for Oral Argument filed on January 28, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

41. IT IS FURTHER ORDERED, That the Request to Strike Request for Oral Argument filed on January 29, 1993 by Mary V. Woodfork IS DISMISSED as moot.

42. IT IS FURTHER ORDERED, That the Motion to Dismiss Request for Oral Argument filed February 3, 1993 by the Mass Media Bureau IS DISMISSED as moot.

43. IT IS FURTHER ORDERED, That the Motion to Strike Opposition to Motion to Strike, filed February 1, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-161

In the Matter of

Clark-Bader, Inc., d/b/a
TMC Long Distance
Complainant,

v. File No. E-89-85

Pacific Bell,
Defendant.

HEARING DESIGNATION ORDER

Adopted: June 1, 1993; Released: June 23, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we designate the above-captioned complaint proceeding for hearing to resolve material questions of fact surrounding Pacific Bell's ("Pacific's") provision of interstate access services to Clark-Bader, Inc., d/b/a TMC Long Distance ("TMC") during the period from 1985 through 1988. The issues to be decided in this Section 208 complaint proceeding[1] are whether Pacific's actions, policies and practices in providing the services complained of violated Sections 201(b)[2] and 202(a)[3] of the Communications Act, and if so, whether TMC suffered any measurable harm as a consequence of such violations.[4] As discussed below, we are unable to resolve substantial questions of fact raised by the parties that are essential to a determination in this proceeding. An evidentiary hearing will provide both TMC and Pacific a full opportunity to establish a record upon which a decision can be made.

II. BACKGROUND

2. TMC filed its complaint in February 1989 alleging, *inter alia*, that Pacific had violated Sections 201(b) and 202(a) of the Act by failing to provide equal access for TMC's competitive long distance services in the San Diego area. On March 31, 1989, Pacific filed an answer and motion to dismiss in which it disputes the legal and factual bases of TMC's claims. Both parties have since filed numerous pleadings and related motions in which the facts and circumstances surrounding Pacific's provision and TMC's taking of the access services are sharply disputed. In addition, the parties have undertaken substantial discovery, including interrogatories, document requests and witness depositions, directed at the identification and production of evidence to support their respective claims.[5]

3. The crux of TMC's complaint is its claim that a defectively engineered equal access tandem switch installed by Pacific in the San Diego area caused TMC's customers to experience severe and repeated disruptions of service, such as blocked calls and excessive post-dial delay.[6] According to TMC, Pacific was well aware of the problems TMC's end-users were experiencing due to the defective access tandem but willfully and intentionally refused to take prompt corrective actions. TMC alleges that through Pacific's actions and inactions, it was denied access services equal to those Pacific readily provides to TMC's competitors such as AT&T, MCI and U S Sprint.[7] TMC claims that Pacific could have quickly addressed TMC's problems by offering direct trunking service that would have avoided switching at the defective access tandem but made no reasonable effort to do so.[8] Pacific's actions, TMC alleges, violated the prohibition against 80 unjust, unreasonable practices and unlawful discrimination contained in Sections 201(b) and 202(a) of the Act.[9] TMC seeks a Commission order directing Pacific to pay monetary damages, plus accumulated interest, for what it describes as the harm to TMC's business, competitive position and growth potential allegedly suffered as a direct result of Pacific's unlawful actions.[10]

4. Pacific admits that its access tandem switch in the San Diego area malfunctioned during the period covered by the complaint.[11] It contends, however, that TMC has greatly exaggerated the difficulties it experienced and misstated Pacific's actions and obligations under the Communications Act and the terms of its tariff.[12] Pacific concedes that TMC could have obtained direct trunking service and

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[1] *See* 47 U.S.C. § 208.

[2] 47 U.S.C. § 201(b). This Section states that "[a]ll charges practices, classifications, and regulations for and in connection with [interstate] communication service shall be just and reasonable ...."

[3] 47 U.S.C. § 202(a). This section makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service ...."

[4] The Commission recently affirmed its discretion (and its staff's pursuant to delagated authority) to conduct bifurcated complaint proceedings, "either by bifurcating discovery itself, or by bifurcating [its] action into liability and damages phases." Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, FCC 93-131, paras. 34-35, _____ FCC Rcd _____ (1993). Whether bifurcation is appropriate in this proceeding is a matter properly left to the discretion of the Presiding Judge.

[5] The record reflects that the parties have already responded to numerous written interrogatories, exchanged thousands of pages of documents and obtained the deposition testimony of at least six potential witnesses.

[6] TMC Complaint at 3-9.

[7] *Id.* at 8-9.

[8] *Id.*

[9] *Id.*

[10] TMC submitted with its complaint a list purporting to show its former customers who allegedly cancelled service orders with TMC due to problems with Pacific's tandem switch. *See* TMC Complaint, Exhibit B. During discovery, TMC produced documents which it claims support Exhibit B. *See* TMC Answer to Interrogatories, dated July 3, 1989.

[11] Answer at 24-28.

[12] *Id.* at 9-17.

avoided the difficulties TMC claims its customers experienced as a result of the defective access tandem. Pacific states, however, that direct trunking service is described in detail in Pacific's access tariffs and alleges that it repeatedly advised TMC of this service alternative.[13] Pacific contends that given the extent of the customer difficulties and dissatisfaction TMC has alleged in its complaint, TMC has offered no credible explanation for its failure to order direct trunking service.[14] Pacific contends, that in any event, TMC has failed to present any facts that would establish that Pacific's actions were the cause of any harm allegedly suffered by TMC during the period in question.[15] With regard to TMC's discrimination claims, Pacific states that all interexchange carriers ("ICs") operating in the San Diego area during the period covered by TMC's complaint had traffic switched at the access tandem. Pacific argues that no discrimination occurred because to the extent TMC experienced difficulties with the switch, so did all other ICs.[16]

5. The principal factual dispute in this matter centers around Pacific's defense that TMC has failed to show that Pacific acted in an unreasonable manner or establish any causal connection between Pacific's actions and the harm that TMC alleges it suffered during the period covered by the complaint. Both TMC and Pacific have pending motions for extraordinary discovery[17] in which they seek to depose a number of witnesses which they claim have first-hand knowledge of the facts and circumstances surrounding the access services provided TMC and the cause and effect of the purported difficulties experienced by TMC during the 1985-1988 period.[18] Although TMC and Pacific have each opposed the scope of the other's discovery requests, both have taken the position in their discovery motions and in discussions with the staff that further fact finding is necessary to resolve the issues raised by the complaint.[19]

III. DISCUSSION

6. Based on our review of the record adduced in this matter, we agree with the parties that further proceedings are necessary to resolve material questions of fact bearing on whether Pacific violated the just and reasonable standard of the Communications Act in connection with its provision of interstate access services to the complainant during the period described in the complaint. Even if it could be said that the record before us provides a sufficient basis to determine that Pacific's actions were unlawful as alleged, we still would be left with a substantial question of whether and to what extent TMC suffered actual harm and is entitled to an award of damages from Pacific as a consequence of Pacific's actions. In order not to delay further a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will designate this complaint proceeding, including all outstanding discovery motions and related pleadings filed in the matter, for hearing before an Administrative Law Judge on the issues of liability and damages set forth below.[20]

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208 and 209, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 10-16. In subsequent pleadings, Pacific has alleged that its review of the customer records submitted by TMC as evidence of the harm it suffered shows that most of the customers listed either cancelled service for reasons other than service problems related to the tandem or cancelled for unknown reasons. Pacific contends that even the records that do support TMC's claims contain notations as to the reasons for cancelling in different handwriting, casting doubt on the authenticity of these records. *See* Motion for Order Granting Immunity for Witnesses, filed March 7, 1991.

[16] *Id.* at 9-10.

[17] The Commission's rules for processing formal complaints under Section 208 of the Act permit parties to initiate limited, self-executing discovery (30 single interrogatories) during the time beginning with service of the complaint and ending 30 days after a reply to the defendants' answer is due. 47 C.F.R. § 1.729. Other forms of discovery, including but not limited to the taking of depositions, production of documents and propounding additional interrogatories, are considered extraordinary and must receive prior authorization by the staff. 47 C.F.R. § 1.730.

[18] TMC filed a Motion for Leave to File Notice to Take Depositions Upon Oral Examination on July 25, 1989 and a supplement to the motion on January 20, 1990. Both parties subsequently filed notices to take depositions of a number of potential witnesses. In addition, Pacific filed a Motion for Order Granting Immunity on March 7, 1991, requesting the Commission to grant two former employees of TMC immunity from federal prosecution. TMC filed a partial opposition to the motion on March 20, 1991. Pacific claims that the two employees are prepared to testify that they were instructed by a TMC principal to falsify certain records on which TMC relied to support its complaint but are fearful of federal prosecution. We note that the Commission has specifically delegated to the Presiding Judge the authority to make the public interest determination required by 18 U.S.C. § 6004 that a grant of immunity is essential to the resolution of an adjudicatory proceeding and to request the Commission's Office of General Counsel to obtain the Attorney General's approval as required by Section 6004. *See* Revised Procedures for Handling Requests for Witness Immunity in Adjudicatory Proceedings, 73 FCC 2d 816 (1979). Pacific's motion for an order granting immunity and all other unresolved discovery motions and related pleadings are encompassed by the issues designated in this order and will be resolved by the Presiding Judge.

[19] In this regard, we note that while neither TMC nor Pacific has formally requested that this matter be designated for hearing, both have informally advised the staff that they view a hearing as the most appropriate and expeditious way to resolve the issues raised by the complaint.

[20] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

1. To determine the facts and circumstances surrounding Pacific's provision of interstate access services to TMC during the period covered by the complaint.

2. To determine whether Pacific engaged in unjust and unreasonable practices and/or charged unjust and unreasonable rates in violation of Section 201(b) of the Communications Act in connection with its provision of interstate access services to TMC during the period covered by the complaint.

3. To determine whether Pacific engaged in unjust and unreasonably discriminatory practices and/or charged unjust and unreasonably discriminatory rates in violation of Section 202(a) of the Communications Act in its provision of interstate access services to TMC during the period covered by the complaint.

4. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, Pacific should be required to pay monetary damages to TMC.

5. To determine, in view of the evidence adduced under the foregoing issues, whether TMC is entitled to an award of prejudgment interest on any damages recovered in this proceeding.[21]

8. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence shall be upon TMC.

9. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 C.F.R. § 1.221, within twenty (20) days of the mailing of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[21] The Commission recently affirmed its authority to award interest in common carrier complaint cases. *See* MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 8 FCC Rcd 1224 (1993), *appeal pending sub nom.* In deciding whether to award interest in a particular common carrier complaint case, the Commision is "generally guided by federal court practice, where the award of prejudgment interest 'is a matter left to the sound discretion of the trial court.'" *Id.* at 1229, citing United States v. California Board of Equalization, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-8

In re Applications of

EVE ACKERMAN — File No. BPH-871123MA

Wayne G. Fields and Geraldine Y. Miller d/b/a LL BROADCASTING — File No. BPH-871124ME

For Construction Permit for
New FM Station on Channel 223A,
Alachua, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1993; Released: June 23, 1993

By the Commission:

1. By this Memorandum Opinion and Order, we deny the petition for reconsideration filed on November 27, 1992 by Eve Ackerman. Ackerman seeks reconsideration of our earlier order, *Eve Ackerman*, 7 FCC Rcd 6872 (1992), affirming without comment the Review Board's grant of LL Broadcasting's application and its denial of Ackerman's competing applications. *Eve Ackerman*, 7 FCC Rcd 2493 (Review Bd. 1992).[1]

2. *Background:* In its petition for reconsideration, Ackerman urges that the record must be reopened and the issues must be enlarged to explore LL Broadcasting's financial qualifications. Ackerman relies on the entry on August 14, 1992 of a money judgment against LL Broadcasting's 75% owner and general partner, Wayne Fields, and against Fields' unrelated business venture, Rendezvous Network a/k/a Rendezvous Advertising.

3. Ackerman notes that the $1,734.88 judgment arose as a result of a civil action instituted by station WOGX-TV (Ocala, Florida). In his capacity as an advertising agent, Fields had purchased time on the station. The station sued when Field did not pay for the advertising. Confident of securing the money to pay WOGX-TV, Fields filed a "Stipulation" on July 16, 1992 agreeing to pay $200.00 each month, beginning in August. But the money was not forthcoming, the August payment was not made, and the $1,734.88 judgment was entered against Fields on August 14, 1992. Noting that this is the third such judgment against Fields, Ackerman urges that Fields' chronic inability to pay just debts requires the addition of a financial issue against LL Broadcasting.

4. LL Broadcasting disputes the need for a financial issue. It notes that Fields has already paid $600, and that the parties have reached an Agreement to Abate Execution, whereby Fields agreed to pay $100.00 per month and WOGX-TV has promised not to enforce the judgment as long as the payments are timely made. According to LL Broadcasting, it has notified its source of financing of the most recent judgment against Fields. LL Broadcasting asserts that the lender remains willing to finance its application. Attached to the opposition is Fields' statement under penalty of perjury that the facts in the opposition are true and correct.

5. In reply, Ackerman urges that the Commission cannot rely on Fields' uncorroborated statement, and that, in the absence of an affirmative statement from the lender, the Commission must remand this case for further hearings. With regard to due diligence, Ackerman claims to have raised its arguments concerning the judgment, which it discovered in November 1992, in a timely manner (i.e., within the time for filing petitions for reconsideration of the Commission's November 13, 1992 denial of its application for review).

6. *Discussion:* Because Ackerman seeks further hearings on additional issues after the close of the hearing record, we have examined its petition for reconsideration according to the more stringent standards governing motions to reopen the record and enlarge the issues. Given the public interest importance of orderliness, expedition, and finality in adjudicatory proceedings, the Commission, with the court's approval, weighs its interest in preserving finality and expediting service to the public against the benefits of future litigation and requires a particularly strong showing of substantive sufficiency for post-hearing motions to reopen the record.[2] Where, as here, an applicant seeks to reopen the record after the close of the hearing,[3] it must show: (1) that it relies on new or newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding;[4] and (3) that there is a substantial likelihood of proving its potentially disqualifying allegations if the case is remanded for further hearings.[5] Viewed by this standard, Ackerman's petition for reconsideration fails all three elements for a motion to reopen the record and must therefore be denied.

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[1] The following pleadings are pending before the Commission: (a) petition for reconsideration, filed November 27, 1992, by Eve Ackerman; (b) opposition, filed December 14, 1992 and supplement thereto, filed December 15, 1992, by LL Broadcasting; and (c) reply to opposition, filed December 28, 1992, by Ackerman.

[2] See *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 7 (1992), appeal pending sub nom. *Evergreen Broadcasting Corporation II v. FCC*, No. 91-1511 (filed 10-18-91), citing *Valley Telecasting v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964); *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 730 ¶ 5 (1988).

[3] Where an applicant seeks additional issues before the close of the hearing record, its issue request would be subject to the requirements of 47 C.F.R. § 1.229, which govern the filing of motions to enlarge issues.

[4] See *Evergreen*, 7 FCC Rcd at 6602 ¶ 8; *Frank Digesu, Sr.*, 7 FCC Rcd 5459, 5460 ¶ ¶ 14-15 & nn.5-6 (1992); 47 U.S.C. § 309 (e).

[5] *Liberty Productions*, 7 FCC Rcd 7581, 7582 ¶ 11 & n.5 (1992), petitions for reconsideration pending, citing *Omaha TV 15*, 4 FCC Rcd 730, 730-31 ¶ ¶ 5-6 (1988). See also *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 8 (1992).

A. Due Diligence

7. Ackerman does not rely on new facts or on newly discovered facts that could not, through the exercise of due diligence, have been discovered earlier. In its reply, Ackerman claims that it did not discover the August judgment until November 1992. But it does not explain why, given its previous reliance on other, similar judgments against Fields, it could not, through the exercise of due diligence, have discovered the judgment -- which was a matter of public record -- before we affirmed the Board's selection of LL Broadcasting on October 22, 1992.[6]

8. However, Ackerman argues that, despite the delay in bringing the judgment to our attention, its pleading was timely under section 1.106(b)(2) because it "relies on facts which relate to events which have occurred ... since the last opportunity to present such matters" to the Commission. It notes that it filed its application for review on May 20, 1992, and that the pleading cycle ended with the filing of LL Broadcasting's opposition on June 4, 1992, more than two months before the entry of a judgment against Fields on August 14, 1992. We reject the argument that it would have been premature to raise the judgment during the pendency of its application for review.

9. Because Ackerman seeks a remand, its "petition for reconsideration" is subject to the more stringent requirements that govern the filing of motions to reopen the record, set forth in paragraph 6, above.[7] Furthermore, even if the more liberal provisions of section 1.106(b)(2) did apply, Ackerman would not have been entitled to wait for Commission action on its application for review before raising the matter of the most recent judgment against Fields. Indeed, it is incumbent upon an applicant to present its arguments as early as possible; it may not "sit back and hope that a decision will be in its favor, and then when it isn't, parry with an offer of more evidence." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941); 47 C.F.R. §§ 1.106(b), 1.229(c). Here, the Fields judgment arose after the close of the hearing record, but any arguments concerning its relevance to LL Broadcasting's financial qualifications could have been presented in supplemental pleadings during the pendency of Ackerman's applications for review.

B. Decisional Significance

10. Having concluded that Ackerman's request for a financial issue against LL Broadcasting is untimely, we proceed to consider whether Ackerman has raised a question that would affect the ultimate outcome of this proceeding and whether it has shown such a substantial likelihood of proving its allegations as to warrant consideration despite its untimeliness. To establish that the judgment against Fields raises such a question, Ackerman must show that it jeopardizes the availability of LL Broadcasting's loan commitment or otherwise affects LL Broadcasting's basic qualifications to be a Commission licensee. For the reasons set forth below, we have concluded that Ackerman has not raised a question that would affect the outcome of this proceeding, let alone shown a substantial likelihood of proving its allegations.

11. Ackerman notes that the August 1992 judgment is the third one entered against Fields since LL Broadcasting filed its application. Because Fields had arranged to satisfy those earlier judgments, and the lender had reaffirmed its continuing willingness to finance LL Broadcasting's application despite the Fields judgments, the Board agreed with the ALJ that the earlier judgments were not a basis for specifying additional issues against LL Broadcasting. 7 FCC Rcd at 2494 ¶ 7. To the extent that Ackerman challenges our refusal to review that finding, the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1965), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

12. Ackerman argues, however, that this chronic failure to pay just debts when they come due represents the type of financial irresponsibility that the Commission indicated that it would not tolerate in *Arizona Mobile Telephone Co.*, 66 FCC 2d 691, 701 (1977).[8] Ackerman therefore contends that the Commission, consistent with its statutory duty under 47 U.S.C. § 308 to make an affirmative finding of financial qualifications, cannot ignore this pattern of unsatisfied judgments.

13. But, even if considered together, the judgments involve a relatively small sum of money, and thus they are not of the magnitude of debt that concerned us in *Arizona Mobile*.[9] Moreover, as the Commission held in *San Joaquin Television Improvement Corp.*, also cited by Ackerman, un-

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[6] Ackerman's claims concerning the August 14, 1992 judgment against Fields mirror the arguments that it made with respect to earlier judgments involving Fields. Given these earlier claims, it was aware of the potential significance of any future judgments. Thus, Ackerman could have, through the exercise of due diligence, discovered the August 14, 1992 judgment and brought it to our ' attention before we denied its May 20, 1992 application for review. Compare *Liberty Productions*, 7 FCC Rcd at 7582-83 ¶ 14 (1992) (denying a motion to reopen and enlarge the issues filed during the pendency of petitions for reconsideration because, given the claimed significance of the liens and the petitioner's awareness of the applicant's financial proposal, the petitioner could have, through the exercise of due diligence, discovered their existence before the Board and the Commission affirmed the initial decision), with *Frank Digesu, Sr.*, 7 FCC Rcd 5459, 5460 ¶ 14 & n.7 (1992) (reopening the record and enlarging the issues based on newly discovered evidence where the petition was filed during the pendency of applications for review and the new evidence was discovered as a result of a chance encounter that occurred after the release of the Board's decision).

[7] See, e.g., *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6601 ¶ 8 (1992).

[8] Ackerman also claims to have made a *prima facie* case of lack of creditworthiness, which allegedly warrants the specification of a financial issue against LL Broadcasting under *Merrimack Valley Broadcasting*, 82 FCC 2d 166, 168 (1980). A financial issue is warranted under *Merrimack*, however, "only upon a specific showing that [an applicant's] credit-worthiness is subject to doubt." 87 FCC 2d at 168. No such showing has been made here concerning LL Broadcasting.

[9] In addition to the outstanding $1,734.88 judgment entered against Fields on August 14, 1992, the earlier judgments were for $420.04 and $679.78. In contrast, *Arizona Mobile* involved tax liens and judgments totaling more than $200,000. The amounts at issue in *San Joaquin Television Corporation*, 2 FCC Rcd 7004 (1987), and *Liberty Productions*, 7 FCC Rcd 7581 (1992) -- also cited by Ackerman -- totaled almost $200,000 and $255,000, respectively.

paid judgments against a principal not pledging to finance the application do not require further inquiry unless they impact on its financial position.[10] Here, it is not alleged that LL Broadcasting is relying on Fields to establish its financial qualifications. This case is therefore distinguishable from *San Joaquin*, as well as *Las Americas Communications, Inc.*, where the non-payment of federal income tax by a principal responsible for financing the application lead to the specification of a financial issue.[11]

14. Although Ackerman urges that the judgments impair LL Broadcasting's financial standing, the first two judgments have been fully satisfied, and LL Broadcasting's opposition reflects that Fields has made acceptable arrangements for paying off the most recent debt.[12] Ackerman -- which has the burden here -- has not challenged this statement, the accuracy of which is verified by Fields' attached declaration under penalty of perjury.

15. Moreover, as noted above, LL Broadcasting recites that its lender remains willing to finance the application. In *Liberty Productions*, 7 FCC Rcd 7581 (1992), we denied a request to reopen the record, holding that liens levied against a principal of the winning applicant after the close of the hearing record did not raise a substantial and material question warranting a financial issue where the lender, aware of the liens, had reaffirmed its willingness to finance the application.[13] As in *Liberty*, there is no basis for further inquiry given the unrebutted assertion of the lender's continuing willingness to finance the application.

16. Ackerman argues, however, that, in the absence of an affirmative statement from the lender confirming its continuing willingness to make the proposed loan despite the most recent judgment against Fields, a remand is necessary. But the judgments, standing alone, do not raise a question warranting any response from the lender. In this respect, *National Communications Industries*, FCC 92I-56 (June 24, 1992), and *Real Life Educational Foundation of Baton Rouge*, FCC 92I-83 (October 15, 1992), cited by Ackerman, are inapposite.

17. Further clarification was requested in *National Communications Industries* because it was unclear on the face of the bank letter whether a certain asset was collateral for the loan. When tax liens were levied against that asset, the applicant was afforded an opportunity to supplement its financial showing to reflect the bank's original intent with respect to the question of collateral. No issue was ultimately warranted because the bank indicated that the asset in question was not collateral for, and did not affect the availability of, the proposed loan.[14] An additional showing was requested in *Real Life*, not because of unpaid judgments, but because of questions raised by a balance sheet that the applicant submitted to establish that the judgments did not affect its financial qualifications. Based on the applicant's further showing, the request for a financial issue was denied.[15] Thus, neither case supports Ackerman's request for remand of this proceeding.

18. ACCORDINGLY, IT IS ORDERED That the petition for reconsideration, filed on November 27, 1992 by Eve Ackerman IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[10] See *San Joaquin*, 2 FCC Rcd at 7005 ¶ 5, citing *Report, Order, and Policy Statement*, 102 FCC 2d 1179, 1204 (1986), recon. denied 1 FCC Rcd 421 (1986). In *San Joaquin*, which Ackerman cites, an issue was added because there was a substantial and material question that the applicant had made intentional misrepresentations to the Commission concerning unpaid judgments against its general partner. *Id.* at 7006 ¶ 19-21. In doing so, the Commission made clear that the failure to pay judgments, standing alone, is not a basis for further inquiry. Thus, unpaid judgments against a principal not responsible for financing the applicant, which did not involve FCC-related conduct and which had not been adjudicated, did not warrant a character issue. *Id.* at 7005 ¶ 5.

[11] 101 FCC 2d 727, 728-29 ¶ 5 (Rev. Bd. 1985). Ackerman faces a heavier burden of proof than did the petitioner in *Las Americas*, inasmuch as the record in this case has already been closed, whereas there the issue was sought before the close of the evidentiary hearing.

[12] To the extent that the petition for reconsideration can be read as suggesting that this pattern of indebtedness reflects a general ineptitude that renders Fields' integration proposal unreliable, it would be nothing more than unsupported speculation.

[13] See also *Weyburn Broadcasting Limited Partnership*, 6 FCC Rcd 1262, 1265 ¶ 17 (Rev. Bd. 1991), review denied, 6 FCC Rcd 4474 (1991), remanded on other grounds, *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378 (D.C. Cir. Feb. 12, 1993), upholding the ALJ's determination that lawsuits, which were withdrawn after the debts giving rise to the lawsuits were satisfied, did not establish a lack of financial qualifications.

[14] *Liberty Productions*, 7 FCC Rcd at 7583-84 ¶ ¶ 16-20. (*Liberty* and *National Communications Industries* are the same case.)

[15] *Real Life Educational Foundation of Baton Rouge*, FCC 93-000 (Date).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-357

In re Applications of

SWAN BROADCASTING LIMITED	File No. BPCT-870717KQ
CRESCENT CITY BROADCASTING CORPORATION	File No. BPCT-880419KE
DELTA BROADCASTING OF LOUISIANA, LTD.	File No. BPCT-880419KF
Robert H. and Janee M. Tucker d/b/a TUCKER BROADCASTING COMPANY, LIMITED PARTNERSHIP	File No. BPCT-880419KG

For Construction Permit for a New Commercial Television Station on Channel 20, New Orleans, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1993; **Released: June 23, 1993**

By the Commission:

1. By this action we set aside a Review Board Decision, *Swan Broadcasting Limited*, 6 FCC Rcd 17 (Rev. Bd. 1991), and remand the proceeding for further consideration of Tucker Broadcasting Company's (Tucker) integration proposal and Delta Broadcasting of Louisiana, Ltd.'s (Delta) financial qualifications.[1] Moreover, the holding in *Jerome Thomas Lamprecht* v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992), that the policy of awarding credit for female ownership violates the Fifth Amendment, requires a reevaluation of the parties comparative qualifications. Accordingly, the parties' requests for relief will be granted to the extent indicated and denied in all other respects.

2. *The Board's Decision:* The Review Board concluded that Tucker is entitled at most to 50 percent integration credit because of its principals' existing business commitments. 6 FCC 2d at 18-19 ¶ ¶ 6-10. It fully credited Swan Broadcasting Limited's (Swan) and Delta's integration proposals, but found no significant differences in the enhancement credits awarded for their local residence and civic activities. The Board found that Swan's integration proposal was enhanced by its principal's female gender and that Delta's integration proposal was enhanced by its principal's broadcast experience. Relying on gender enhancement as a dispositive factor, the Board granted Swan's application. 6 FCC Rcd at 21 ¶ 20. The Board also found there were unresolved questions concerning Delta's financial proposal which would necessitate a remand if Delta were to prevail. 6 FCC Rcd at 23 n.6. In light of *Lamprecht*, the gender credit awarded Swan is no longer a relevant consideration.

3. *The Pleadings:* Tucker argues that the Board erred in failing to credit fully its integration proposal, that the Board erred in fully crediting Swan's[2] and Delta's proposals, and that its proposal should be granted, in any event, on the basis of its qualitative enhancements. Delta and Swan each contends that it should be preferred because of its principal's enhancement for local residence and civic activities. Delta further argues that, if it and Swan are equal on local residence and civic activities, absent any gender enhancement, its principal's broadcast experience is decisive.[3]

4. *Tucker's Integration Proposal:* Tucker's principals, Robert H. and Janee M. Tucker, own and manage Tucker and Associates, Inc. (TAI), a consulting firm which has participated in a Small Business Administration (SBA) Section 8(a) program that provides assistance to minority owned businesses. After the close of the hearing, Delta moved to reopen the record to consider documentation that the Tuckers have continuing obligations to administer contracts awarded under the Section 8(a) program. 13 C.F.R. § 124.208. In response, Tucker requested further hearing proceedings to permit Tucker to show how its principals' SBA obligations could be reconciled with their integration proposals.

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[1] Before the Commission are Applications for Review filed February 4, 1991 by Delta Broadcasting of Louisiana, Ltd. and by Tucker Broadcasting Company, Limited Partnership; and an Opposition filed February 19, 1991 by Swan Broadcasting, Limited. By Order, *Swan Broadcasting Limited*, FCC 92I-23 (OGC April 13, 1992), the parties were authorized to submit comments concerning the impact of the *Lamprecht* decision on the resolution of this proceeding. Comments were filed May 4, 1992 by Swan, Delta and Tucker and Reply Comments were filed May 14, 1992 by Delta and Tucker. In addition, Tucker filed a Petition for Leave to Amend and Reopen the Record on May 11, 1992 and Swan filed an opposition on May 20, 1992. Crescent City Broadcasting Corporation did not file an application for review. Thus, the Board's decision is final with respect to Crescent's application.

[2] Mr. Tucker's arguments concerning Swan's integration and a criminal conviction of its general partner were fully considered and properly rejected by the Board. 6 FCC Rcd at 19-20 ¶ 14, 21-22 ¶ ¶ 21-23, 23 n.5.

[3] Tucker and Swan also argue that Delta is only entitled to 33 1/3 percent integration credit, but those arguments were fully considered by the ALJ, and no persuasive showing has been made that he erred in concluding that Delta is entitled to 100 percent integration credit. *See* 5 FCC Rcd 3045, 3048 ¶ ¶ 22-25 (ALJ 1990).

5. The ALJ granted Delta's motion and reopened the record to consider a letter dated January 11, 1990, from Alan J. Wells, New Orleans SBA District Counsel, documenting TAI's SBA contracts. The ALJ rejected Tucker's request for further hearings, concluded that the Tuckers have an obligation to continue managing the TAI contracts on a full time basis, and reduced the credit awarded for Tucker's integration proposal. 5 FCC Rcd at 3048-49 ¶ ¶ 26-30. On appeal to the Review Board, Tucker claimed that TAI was scheduled to graduate from the SBA program in October 1990. However, finding an unresolved conflict between the Tuckers' SBA responsibilities and their integration proposals in this proceeding, the Board affirmed. 6 FCC Rcd at 19 ¶ 9.

6. Tucker argues that its principals fully disclosed their interests in TAI, that Janee Tucker testified that TAI was obligated to meet SBA requirements (she did not explain and she was not examined concerning the nature of the SBA requirements) and that during the hearing the ALJ permitted a wide-ranging questioning of the Tuckers concerning both their plans for TAI and how they will fulfill their integration commitments. It thus asserts that the other parties had sufficient opportunity to examine the Tuckers' integration proposals and that the proffer of evidence in Delta's motion to reopen was untimely. Tucker further alleges that it was prejudiced because the ALJ did not give it an opportunity to test Delta's showing in hearing and to adduce testimony concerning the January 11 letter from Wells.

7. 13 C.F.R. § 124.104 requires that at least one principal of a Section 8(a) participant maintain exclusive control and management over the daily business operations of the firm and hold a full time position as President and/or CEO of the business. Section 124.104 also prohibits outside employment without written permission from the SBA as well as all outside employment which "conflicts with the management of the firm or hinders it in achieving" its business objectives. TAI was a Section 8(a) participant when Tucker filed its application, and it was administering contracts awarded under the Section 8(a) program when the hearing record was closed. TAI remained in the Section 8(a) program until October 1990, and contracts issued under the Section 8(a) program were not expected to be completed until December 1990.[4] In a letter dated May 29, 1990, concerning TAI's continuing obligations, Wells stated that:

> following the graduation of TAI from the program, in spite of the fact that TAI may technically be in violation of our regulations because of a lack of full time employment status by Bob and/or Janee Tucker, it is my opinion that as long as both Bob and Janee Tucker remain the majority stockholders, principal directors and officers of TAI, and as long as they are able to retain effective and sufficient control over the business operations of TAI to the exclusion of all others, their failure to continue as 'full time' employees of TAI would probably not be a basis upon which the Agency would terminate the present 8(a) contract ....[5]

8. On the one hand, until TAI graduated from the Section 8(a) program in October 1990,[6] the Tuckers had an obligation to maintain full-time and exclusive control and management over TAI's business operations. On the other hand, Wells' statement indicates that the Tuckers' failure to remain at TAI on a full-time basis after graduation from the program would not result in termination of the Section 8(a) contracts and all of the contracts were due to expire before the end of 1990.[7] We recognize that Tucker could have been more forthcoming concerning the nature of its principals existing obligations under the SBA program during the hearing. However, it is also clear that Delta did not raise any questions concerning this matter until after the hearing record had been closed. Thus, despite Tucker's request for further hearings, it never had an opportunity to explain in light of the supplemental information how the Tuckers intended to reconcile their undefined obligations to maintain sufficient and effective control over TAI with their integration proposals. Moreover, the Wells' May 1 and May 29, 1990 letters raise factual questions concerning the impact of the Tuckers' Section 8(a) obligations on their integration commitments which have not been clearly resolved. Under these circumstances, we are convinced that the ALJ erred in not holding further hearings and that this proceeding should be remanded to an ALJ to consider whether Tucker can reconcile its principals' Section 8(a) obligations with their integration proposals.[8]

9. *Delta's and Swan's Integration Proposals*:[9] The Review Board accorded both Delta and Swan 100 percent integration credit, 6 FCC Rcd at 20 ¶ ¶ 15 and 23 n.6, and neither applicant has any cognizable mass media interests. 5 FCC Rcd 3045, 3049 ¶ 34 (ALJ 1990). The Board found that there was no significant difference between Swan's and Delta's local residence and civic activities, and that neither applicant was entitled to an advantage in that regard. 6 FCC Rcd at 21 ¶ 20.

10. Delta argues that the Board failed to fully credit the local residence and civic activities of its sole general partner, John G. Curren. Curren was born in New Orleans in

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[4] The hearing record was closed in December 1989.

[5] In a letter dated May 1, 1992 Wells also represented that the failure of Robert and Janee Tucker to remain as full time employees of TAI would not be a basis for termination of the Section 8(a) contracts.

[6] The amendment filed May 11, 1992 by Tucker, reporting that TAI graduated from the Section 8(a) program in October 1990 will be accepted for reporting purposes under 47 C.F.R. § 1.65.

[7] In this regard, the Board held that the Tuckers are "required 'to retain effective control' over TAI 'to the exclusion of all other employment activities.'" 6 FCC Rcd at 19 ¶ 9. Contrary to the Board's conclusion, we agree with Tucker that the Well's letter indicates that, after graduation from the Section 8(a) program, SBA policy would not preclude "all other employment activities."

[8] Tucker's situation is distinguishable from *Charisma Broadcasting Corp.*, 8 FCC Rcd 864, 866-67 ¶ ¶ 11-15 (1993), where the Commission rejected an applicant's integration proposal without further hearings. In *Charisma*, there were no factual questions concerning the applicant's post-hearing decision to conduct an election campaign for Congress that was inconsistent with her integration commitment. Moreover, the applicant failed to timely request a hearing concerning its integration proposal. In contrast to *Charisma*, the Tuckers did not make any change in their activities or otherwise create a post-hearing contingency concerning their integration proposal. The arguments concerning Tucker's proposal were raised in Delta's post hearing motion to reopen the record, and Tucker timely requested additional hearings.

[9] In order to provide guidance for the further proceedings specified above, we will also address arguments raised concerning the other applicants.

1941 and has lived there except for when he was in the Navy and at college, and from September 1976 to April 1979 and January 1985 to May 1986 when he was employed elsewhere. The Board properly diminished Delta's overall credit for local residence for the period when he was a minor and for his absences from New Orleans. 6 FCC Rcd at 21 ¶ ¶ 18-19. The Board also awarded "little or no weight" for limited civic activities (a reference to involvement in the Jaycees and WYES-TV, without further explanation) occurring over 10 years ago and only minor credit (not none as Delta asserts) for the remainder of his activities because they occurred after the filing of Delta's application. 6 FCC Rcd at 21 ¶ 20.

11. Turning to Swan's proposal, its sole general partner, Vaccari, has lived continuously in New Orleans since 1981. Since 1982 she has been active in Alcoholics Anonymous; organized seminars to educate the community about alcoholism; and been a member of the AA Service Board and of the Hospital and Institute Committee where she was a liaison to re-orient patients to return to society. In 1984 she was an organizer of a halfway house for alcoholic woman. She is also involved in a Ladies Republican Organization, a local church, the Zoo and the Arts Council.

12. The Board properly found Swan had an advantage over Delta for civic activities. 6 FCC Rcd at 21 ¶ 20.[10] Swan demonstrated a substantial and continuing involvement by Vacarri in significant civic activities, while Curren's fewer activities, occurred either in the 1970's or after the filing of Delta's application. On the other hand, Curren has a longer but intermittent local residence. Thus, on balance, any advantage which accrues to Delta for Curren's longer residence is offset by Vacarri's impressive showing of civic activities; and we agree with the Board that there is no significant difference in the overall assessment of the comparative credit to be awarded for Swan's and Delta's local residence and civic activities.

13. Absent the gender enhancement previously credited Swan, and subject to the further proceedings specified above concerning Tucker's integration proposal, Delta's advantage for Curren's broadcast experience would be dispositive as between these two applicants. However, before we can give further consideration to Delta's application, we must address the financial questions concerning Delta's proposal noted by the Board.

14. *Delta's Financial Qualifications:* Curren testified that it would cost between $2.5 and $4 million to put Delta's proposed station on the air and that he had a commitment from his stepfather to provide the funds for the station. Tr. 158-59. Subsequently, in a declaration dated February 5, 1990, Curren represented that his stepfather had "indicated his intent to personally loan, or personally guarantee a loan . . . to provide Delta with the aforesaid funds." Curren subsequently submitted a declaration dated February 13, 1990, from his stepfather which did not affirm a commitment to loan Delta the funds but stated only that he intended "to assist by helping to raise the required funds. . . ."

15. There is no showing that Curren's stepfather will provide the required funds; rather Delta has shown only that he will assist Curren in securing a loan. Absent a firm intention by Curren's stepfather to loan Delta the funds required for the construction and operation of its proposed station, there is a substantial and material question about whether Delta was financially qualified when it certified its qualifications. Moreover, if Delta is now relying on the stepfather's commitment to assist Delta in securing a loan, Delta would be required to amend its financial showing to establish that it has a commitment from a bank or other lending institution, demonstrating a firm intention to make the loan assuming Delta is able to satisfy the conditions for the loan. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). Furthermore, Delta would be required to establish good cause for such an amendment pursuant to *Erwin O Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970). *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ ¶ 12-13 (1991). Thus, substantial and material questions have been raised concerning Delta's financial qualifications and we will remand this proceeding for further hearings on financial certification and financial qualifications issues.

16. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE REMANDED FOR FURTHER EXPEDITED PROCEEDINGS in a consolidated hearing before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine the facts and circumstances concerning TAI's SBA obligations and the extent of the integration credit, if any, to be awarded for the proposed participation in the management of Tucker Broadcasting Company by Robert H. Tucker and Janee M. Tucker.

2. To determine whether Delta Broadcasting of Louisiana, Ltd. falsely certified its financial qualifications to the Commission.

3. To determine whether Delta Broadcasting of Louisiana, Ltd. is financially qualified to construct and operate its proposed station.

4. To determine, in light of the evidence adduced pursuant to the above-specified issues, whether Delta Broadcasting of Louisiana, Ltd. is qualified to be a Commission licensee.

17. IT IS FURTHER ORDERED, That the Administrative Law Judge IS DIRECTED to prepare a Supplemental Initial Decision[11] and the paries SHALL FILE exceptions thereto, if any, directly with the Commission.

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[10] Although Delta argues that Vaccari's involvement with Alcoholics Anonymous should not be considered voluntary because it was required as a condition for her probation following a guilty plea on a manslaughter charge, it is clear that the leadership and involvement of Vaccari went beyond the terms of any probation.

[11] The ALJ is also directed consistent with the efficient and orderly resolution of the cases pending before him, to expedite his consideration of the further hearings pursuant to the procedures set forth in the *Hearing Reform Report and Order*, 6 FCC Rcd 157 (1990), *reconsideration granted in part*, 6 FCC Rcd 3403 (1991). In this regard, we direct the parties to file motions concerning discovery procedures within 10 days from the release date of this Memorandum Opinion and Order. Finally,

18. IT IS FURTHER ORDERED, That the Petition for leave to Amend and Reopen the Record filed May 11, 1992 by Tucker Broadcasting Company IS GRANTED; and that the Amendment filed May 11, 1992 by Tucker Broadcasting Company IS ACCEPTED.

19. IT IS FURTHER ORDERED, That the Decision of the Review Board, 6 FCC Rcd 17 (1991) IS SET ASIDE and the Applications for Review filed February 4, 1991 by Tucker Broadcasting Company, Limited partnership and by Delta Broadcasting of Louisiana, Ltd. ARE GRANTED to the extent indicated herein and that in all other respects those Applications for Review ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

absent good cause, any such discovery shall be completed within 30 days of the ALJ's action on such motion or motions. *See Hearing Reform*, 6 FCC Rcd at 161 ¶ 30; 47 C.F.R. § 1.229(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MALRITE	File Nos. BAL-930330GY
COMMUNICATIONS	BALH-930330GZ
GROUP, INC.	BAL-930330HD
(Assignor)	BALH-930330HE

and

SHAMROCK HOLDINGS, INC.
(Assignee)

For Assignment of Licenses of
KLAC(AM) and KZLA-FM, Los Angeles,
CA, and WHK(AM) and WMMS(FM),
Cleveland, OH

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1993; Released: June 23, 1993

By the Commission:

1. The Commission has before it the above-captioned applications for the sale of the assets and assignment of the licenses for Stations KLAC(AM) and KZLA-FM, Los Angeles, California, and WHK(AM) and WMMS(FM), Cleveland, Ohio, from Malrite Communications Group, Inc. ("Malrite") to Shamrock Holdings, Inc. ("Shamrock"). Roy E. Disney and Stanley P. Gold, Chairman and President of Shamrock respectively, hold attributable interests in the licensee of VHF television Station KCAL-TV, Los Angeles, California. In addition, Milton Maltz, a proposed 6.3% shareholder in Shamrock, holds an attributable interest in the licensee of UHF television Station WOIO, Shaker Heights, Ohio. The Grade A contour of KCAL-TV encompasses the entire community of Los Angeles, while the Grade A contour of WOIO(TV) encompasses the entire community of Cleveland. Thus, a grant of the assignment applications would result in Messrs. Disney and Gold and Mr. Maltz owning attributable interests in a television station and radio stations in the same market in violation of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] Shamrock has therefore requested waivers of that rule. The applications are unopposed.

2. In support of these waiver requests, Shamrock relies on the Commission's decision generally to permit television-radio combinations which meet the "Top 25 Markets/30 Voices" test set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *on reconsideration*, 4 FCC Rcd 6489 (1989).[2]

3. In regard to KLAC and KZLA-FM, Shamrock points out that Los Angeles is the 2nd largest Area of Dominant Influence (ADI) television market and has more than 30 separate radio and television voices. According to the showing provided by Shamrock, there are currently "81 radio broadcast stations in operation in the Los Angeles television metropolitan market and 21 television stations which serve the Los Angeles ADI market." Exh. II-1, Att. A at 4. When taking into account the eleven AM/FM combinations, one AM/AM/FM combination and one TV/AM/FM combination, "there will be 85 separately owned or operated broadcast stations in existence in the Los Angeles market after the assignments proposed herein are consummated." *Id.* at 5.

4. In regard to WHK and WMMS(FM), Shamrock states that Cleveland is the 12th ranked ADI television market and that it also has more than 30 separate radio and television voices. According to the showing provided by Shamrock, there are currently 33 radio stations and 13 television stations serving the Cleveland market. When taking into consideration the seven AM/FM combinations and one TV/AM/FM combination, there will continue to be "37 separately owned or operated broadcast stations in the Cleveland market." *Id.* at 5-6.[3]

5. In the *Second Report and Order*, the Commission set forth the standard for reviewing waivers of the "one-to-a-market" rule. The Commission concluded that it would "look favorably upon waiver requests when the radio and television stations involved are located in the top 25 ADI television markets as defined by the Arbitron Ratings Company and in addition where, following the proposed combination, there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices'." *Second Report and Order*, 4 FCC Rcd at 1751. To determine the number of voices, the Commission counts all full-power commercial and non-commercial television stations licensed to the relevant ADI television market and operating AM and FM radio stations licensed to the relevant TV metropolitan market, as defined by the most recent volume of Arbitron's *Television ADI Market Guide*. *Id.* at 1751 & 1759 nn.84-85. *See generally Arnold L. Chase*, 5 FCC Rcd 1642, 1646 (1990). Furthermore, the attribution provisions of the Commission's local ownership rules are used to determine the number of separately owned, operated and controlled broadcast licensees or voices in the relevant market. *Report and Order*, 4 FCC Rcd at 1751, 1759 n.87. *See also Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989). The Commission has determined that "the

[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] The "Top 25 Markets/30 Voices" standard is set forth in Note 7 to the one-to-a-market rule. *See* 47 C.F.R. § 73.3555 n.7.

[3] Mr. Maltz is the controlling shareholder of Malrite. Currently, Malrite controls the Cleveland TV/AM/FM combination. As a result of the proposed transaction, Mr. Maltz will retain control of WOIO(TV) but, through his 6.3% interest in Shamrock, will have only a minority interest in the radio stations. Thus, this transaction will result in a reduction in the level of cross-ownership in the Cleveland market.

advantages of permitting radio-television combinations in the top 25 markets, which have numerous competing voices, generally would not undermine the benefits derived from the Commission's traditional pro-competitive and diversity policies." *The Helen Broadcasting Co. Limited Partnership*, 5 FCC Rcd 2829 (1990). *See Cook Inlet Radio Partners, L.P.*, 7 FCC Rcd 2330 (1992); *Group W Radio Acquisition Co.*, 4 FCC Rcd 8343 (1989).

6. We find that the evidence presented by Shamrock demonstrates that the proposed transactions will not result in fewer than 30 separately owned, operated and controlled broadcast stations in either Los Angeles, the 2nd ranked ADI market, or Cleveland, the 12th ranked ADI market. Accordingly, Shamrock has provided the necessary documentation to meet the "Top 25 Markets/30 Voices" standard and, in the absence of rebuttal, to demonstrate that waiver of the one-to-a-market rule is in the public interest. *See, e.g., Susquehanna Radio Corp.*, 6 FCC Rcd 6547 (1991). Furthermore, Shamrock is otherwise qualified to be a Commission licensee, and, therefore, we find that grant of the assignment applications would serve the public interest, convenience and necessity.

7. In view of the foregoing, IT IS ORDERED That the requests for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), ARE HEREBY GRANTED, and the applications for the sale of the assets and assignment of the licenses of KLAC and KZLA-FM, Los Angeles, California, and WHK and WMMS(FM), Cleveland, Ohio, from Malrite Communications Group, Inc., to Shamrock Holdings, Inc., ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ROCHLIS-JOHNSON PARTNERSHIP — File No. BPH-910211MH

For Construction Permit
for a New FM Station
on Channel 234A
Thousand Palms, California

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1993; **Released: June 23, 1993**

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration an Application for Review and Motion to Set Aside Grant filed on July 30, 1992, by Dr. Sam Walters ("Walters")[1] For the reasons set forth below, we deny the application for review and the motion to set aside the grant of the Rochlis-Johnson Partnership ("Rochlis-Johnson") application.

II. BACKGROUND

2. Petitioner Walters is a former applicant for a new FM construction permit in Thousand Palms, California. By letter dated August 29, 1991, the Chief, FM Branch, Mass Media Bureau ("Bureau"), dismissed Walters' application, among others, for failure to pay the hearing fee on or before July 15, 1991, as required. The remaining applicants subsequently reached a settlement agreement, which was submitted to the Commission on July 31, 1991. The Bureau approved the settlement agreement by letter dated June 23, 1992. Pursuant to the settlement agreement, the application of Sam Idas was dismissed and applicants Jeffrey Rochlis and Douglas Johnson merged their applications to form a new entity, Rochlis-Johnson, which was granted the construction permit. Walters now requests that the grant be rescinded and his application be reinstated.

III. DISCUSSION

3. In his application for review, Walters contends that the Commission's use of certified mail in some situations but not others, such as in this case, has resulted in his not receiving notice of the dismissal of his application, or of the grant, and/or dismissal of the other applications. Thus, Walters argues, the "Commission's actions have denied Walters due process of law, equal protection of the law, has provided for selective enforcement of its Rules, and denied the right to participate in a comparative hearing for [the Thousand Palms allotment]." We disagree.

4. The August 29, 1991, letter dismissing Walters' application for failing to timely remit the required hearing fee was mailed to Walters at "12326 Granada, Leawood, Kansas 66209," the address to which Walters had indicated, in an amendment to his application filed June 3, 1991, that all communications should be sent. The dismissal of Walters' application was also announced by the Commission in a Public Notice released September 5, 1991. Although the dismissal letter was not sent by certified mail, the procedure used by the staff in this case was fully consistent with past practice with respect to letters dismissing FM applications. Walters has not shown how this dual notification process deprives a reasonably diligent applicant of the information necessary to pursue his application in a timely manner or in any way denies him due process. Nor has he demonstrated that the treatment accorded him specifically was inconsistent with the established notification procedure or that it differed in any material respect from the treatment accorded similarly situated applicants. We conclude that Walters has not established that his application, the dismissal of which became final approximately nine months prior to the filing of the instant pleadings, is entitled to reinstatement.

IV. ORDERING CLAUSES

5. Accordingly, for the reasons stated above, IT IS ORDERED That Walters' Application for Review and Motion to Set Aside Grant IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Also before the Commission is a Joint Opposition to Application for Review and Motion to Set Aside Grant filed on August 14, 1992, by Rochlis-Johnson Partnership and former applicants Jeffrey Rochlis, Douglas Johnson, and Sam Idas.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-105

In the Matter of

Virgin Islands Public Safety Plan

ORDER

Adopted: June 15, 1993; Released: June 23, 1993

1. On January 28, 1993, Region 48 (Virgin Islands) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the Virgin Islands.

2. The Virgin Islands Plan was placed on Public Notice for comments due on May 17, 1993, 58 FR 19669 (April 15, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for the Virgin Islands and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Virgin Islands.

4. Therefore, we accept the Virgin Islands Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Virgin Islands may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FOR WAIVER FILED BY ROCHESTER TELEPHONE CORPORATION

On May 20, 1993, Rochester Telephone Corporation (Rochester) petitioned the Commission to waive certain provisions of Parts 61 and 69 of the Commission's rules. Rochester seeks the waivers in order to modify its access tariff to accommodate a proposed restructuring of the company.

Rochester states that on February 3, 1993, it filed a petition with the New York Public Service Commission seeking approval of a proposed restructuring plan called the Open Market Plan. Rochester states that the Open Market Plan will apply only to services offered in the Rochester, New York area. Rochester states that under this Plan its local exchange operations would be divided into two parts. Rochester states that basic network services would be provided by a new, fully regulated subsidiary called "R-Net." Rochester states that R-Net would offer basic network services on an unbundled, nondiscriminatory basis under a "full interconnection" tariff. Rochester states that the second newly created subsidiary, called "R-Com," would offer local exchange and intraLATA services at the "retail" level. Rochester states that the corporate management and administrative functions would remain at Rochester, which would become the unregulated holding company parent of R-Net and R-Com.

Rochester requests waivers of the Commission's rules governing the assessment of the End User Common Line, Carrier Common Line, and Presubscription Change charges. In addition, Rochester seeks authority for R-Net to establish a Common Line Connection charge to enable unbundled access to its common line and local switching services. Rochester also requests a waiver to reference technical standards outside the R-Net tariffs.

Rochester argues that grant of the proposed waivers would further the public interest. Rochester states that the Open Market Plan will: (1) provide end users with a choice of local/intraLATA service providers; (2) assure competitors that they will be able to obtain access to the existing local exchange network on reasonable and nondiscriminatory terms; and (3) permit Rochester, through a separate subsidiary, to participate in the newly competitive local market without any unfair advantage due to its ownership of the basic network infrastructure.

Interested parties are to file comments on this petition by **July 19, 1993,** and reply comments by **August 9, 1993,** with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FOR CLARIFICATION OR, ALTERNATIVELY, WAIVER OF THE CPE UNBUNDLING RULES

On May 14, 1993, Swidler & Berlin filed a petition on behalf of several interexchange (IXC) services resellers ("Petitioners"). The Petitioners seek a clarification or, in the alternative, a waiver of Section 64.702 of the Commission's Rules with respect to non-dominant resellers of IXC services.

The Petitioners state that Section 64.702 currently prohibits the bundling of interstate common carrier services with customer premises equipment (CPE). The Petitioners state that the Commission adopted the unbundling rule in 1980 as a means of preventing anti-competitive tying arrangements that would restrict consumer choice and undermine development of a competitive CPE market. Petitioners argue that underlying this policy was the premise, then a realistic one, that regulated common carrier services are essentially monopolistic. They argue that this premise does not apply in today's marketplace to non-dominant resellers, and that accordingly, there is no reason to prohibit these carriers from bundling. Petitioners note that the Commission has created an exception to the unbundling rule for cellular carriers even though the Commission did not find that cellular services are fully competitive. Petitioners argue that non-dominant resellers clearly lack market power and that, consequently, an even stronger case can be made for allowing non-dominant resellers to bundle.

The Petitioners argue that application of the bundling restriction to non-dominant resellers is not only unnecessary, but harmful to consumers. They argue that this application restricts rather than expands consumer choices and limits rather than promotes CPE competition.

Interested parties are to file comments on this petition by **July 19, 1993,** and reply comments by **August 3, 1993,** with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DATRON SYSTEMS, INC. File No. I-T-C-93-080

Application for authority to acquire and operate facilities for direct service between the U.S. and certain international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 25, 1993; Released: June 23, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international private line service between the U.S. and the points listed in the Appendix hereto by Datron.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-080 IS GRANTED, and Datron is authorized to:

a. lease from IDB Communications Group, Inc. and operate 51 64-kbps satellite circuits between an appropriate earth station on the east coast of North America and an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR), connecting with similar half-circuits between the satellite and earth stations at the points listed in the Appendix hereto furnished by Datron's correspondents;

b. lease from Southwest Communications, Inc. and operate 51 64-kbps circuits in the earth station to be used in conjuction with the space segment capacity;

c. lease and operate 51 64-kbps connecting circuits between the earth station and Datron's U.S. operating center; and

d. use the facilities in a, b and c above to resell international private lines not interconnected to the public switched network for the provision of international private line service between the U.S. and the points listed in the Appendix hereto.[1] [2]

3. IT IS FURTHER ORDERED that our authorization of applicant to provide private lines is limited to the provision of such private lines only between the U.S. and those points listed in the Appendix hereto -- that is, private lines which originate in the U.S. and terminate in one of the points listed in the Appendix, or which originate in one of the points listed in the Appendix and terminate in the U.S. In addition, applicant may not -- and applicant's tariff must state that applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between Datron and its correspondents, and a copy of the agreements, including the applicable accounting rate, shall be filed with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

---

[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[2] *See* the Appendix hereto for a list of authorized international points. We note that should the applicant obtain any interest in facilities beyond the authorized international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of lines under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986), it would be necessary for applicant to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

6. IT IS FURTHER ORDERED that neither Datron nor any persons or companies directly or indirectly controlling or controlled by Datron, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Datron or any persons or companies controlling or controlled by Datron are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that:

(a) Datron shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203 and the *Interexchange Order*;[3] and

(b) the services obtained by Datron shall be made generally available to similarly situated customers at the same terms, conditions and rates.

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	No. of 64 kbps channels
Latvia	6
Russia	13
Ukraine	18
Byelorus	7
Georgia	7
	Total 51

[3] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-93-090

Application for authority to operate additional satellite facilities for service to the Pacific Ocean Region and to provide direct service between the U.S. and Nauru.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 7, 1993; Released: June 23, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telegraph and Telephone Company (AT&T), requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Nauru by AT&T.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-090 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate a total of eight voice-grade satellite circuits between an appropriate earth station on the west coast of North America and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and Nauru furnished by AT&T's correspondents;

b. acquire and operate a Digital Circuit Multiplication Equipment (DCME) terminal to derive additional satellite circuits; and

c. use said facilities to provide AT&T's authorized services on a direct basis between the U.S. and Nauru.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T and its correspondent in Nauru and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. The Commission's Order, Authorization and Certificate, released December 28, 1990, DA 90-1851, 5 FCC Rcd 7715 (1990), File No. I-T-C-90-015, is hereby modified by adding Nauru to the list of countries and by increasing the blanket authorization by eight circuits, total 2780, through 1995.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Points in the Pacific Ocean Region to Which AT&T is Authorized to Lease and Operate Satellite Circuits

American Samoa
Australia
Brunei
China
Fiji
Guam
Hong Kong
Indonesia
Japan
Korea
Macau
Malaysia
Marshall Islands
Micronesia
Midway Island
Nauru
New Caledonia
New Zealand
Palau
Papua New Guinea
Philippines
Saipan
Singapore
Tahiti
Taiwan
Thailand
Tonga
Wake Island
Western Somoa

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Conair Corporation NAL/Acct. No. 215HF0014
Edison, New Jersey

ORDER

Adopted: June 7, 1993; Released: June 23, 1993

By the Field Operations Bureau:

The Notice of Apparent Liability for Monetary Forfeiture issued to Conair Corporation by Mary Beth Richards, Chief, Enforcement Division, Field Operations Bureau, on August 13, 1992, for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. Section 302(b), and Sections 2.803, 15.233(c) and 15.201(b) of the Commission's Rules, 47 C.F.R. Sections 2.803, 15.233(c) and 15.201(b), is hereby cancelled.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 4, 1993

Released: June 23, 1993

Mr. Larry Ellis Reed
1723 W. Broadway, Apt. B
Winona, Minnesota 55987-2020

8210-AJZ
93030058

Cary S. Tepper, Esquire
Meyer, Faller, Weisman and Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015

Gentlemen:

This is in reference to the complaints filed by Larry Ellis Reed against Armada Broadcasting Company, licensee of radio stations WNNO (AM/FM), Wisconsin Dells, Wisconsin, alleging that Armada is in violation of the Commission's multiple ownership rules by operating a daily newspaper, the *Dells-Delton Daily*, which serves the same community as the radio stations. Armada responded that although it publishes the *Daily* on a daily (except Sunday) basis, it does not constitute a "newspaper" for purposes of the multiple ownership rule's cross-ownership prohibition, because it is printed by desktop publishing methods, it serves only a fraction of WNNO's listening audience, its emphasis is on community affairs, rather than local news stories, and it does not qualify as a newspaper under state law. Armada also requests a declaratory ruling on the following points:

(1) Is there an exact circulation number or circulation/population formula for the *Dells-Delton Daily* that would invoke § 73.3555?

(2) Irrespective of circulation, are there content criteria for a publication to be considered a "newspaper" for purposes of § 73.3555?

(3) Do local or state regulations have any impact on the Commission's determinations in this area?

The radio/newspaper cross-ownership rule, contained in the Commission's multiple ownership rule at Section 73.3555(c)(1) and (c)(2), states:

> (c) No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:
>
> (1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.186, encompassing the entire community in which such newspaper is published; or
>
> (2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

Note 6 to § 73.3555 defines "daily newspaper" as one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication.

We agree with Armada that the *Dells-Delton Daily* is not a "daily newspaper" for purposes of the cross-ownership rule. In adopting the rule, the Commission stated:

> Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily newspapers of general circulation.

Multiple Ownership Rules, 50 FCC 2d 1046, 1075 (1975)(subsequent history omitted). As Armada points out, the *Daily's* current circulation is 160, a fraction of the listening audience of its stations (227,000 daytime, 29,000 nighttime). Although some of the listenership of stations WNNO (AM/FM) also read the *Daily*, its circulation is so small that it does not appear to reach the level of an "important fraction of the media mix" in Wisconsin Dells. *Id.* It is, at best, a secondary source of local information. Thus, we do not consider the *Daily* a newspaper of "general" circulation in the community. Second, the *Daily's* emphasis on community affairs, rather than local news differentiates it from the types of newspapers the Commission has considered in its cross-ownership rulings. *See, e.g., Twentieth Holdings Corp.*, 61 RR 2d 1484 (1986)(Boston Herald considered "daily newspaper"); *Evening News Association*, 59 RR 2d 1054 (1986)(rule not applicable to national newspaper). Nor does it appear to represent any editorial viewpoint, as would a daily newspaper. As such, it does not raise the diversity concerns the Commission was targeting in adopting the cross-ownership prohibition.

In view of our conclusion regarding the *Dells Delton-Daily*, we find it unnecessary to issue a declaratory ruling regarding the publication. Accordingly, the complaint filed by Larry Ellis Reed against Armada Broadcasting Company IS HEREBY DENIED.

Sincerely,

Edythe Wise, Chief
Complaints & Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CHAPMAN S. ROOT
REVOCABLE TRUST

Licensee of Stations	
WNDB(AM), Daytona Beach, Florida,	File No. BAL-901126GV
WWLV(FM), Daytona Beach, Florida[1]	File No. BALH-901126GW
WLKF(AM), Lakeland, Florida	File No. BAL-901126GX
WEZY(FM), Lakeland, Florida	File No. BALH-901126GY

For Assignment of Licenses to
Chapman S. Root 1982 Living Trust

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1993; Released: June 24, 1993

By the Commission:

1. The Commission has before it (a) an Application for Review, filed November 18, 1992, by The Florida State Conference of Branches of the NAACP and its respective branches ("NAACP"); and (b) an Opposition thereto, filed December 2, 1992, by Chapman S. Root Living Trust ("Root Living Trust"). NAACP requests the Commission to reverse the staff action in *Letter of the Chief, Video Services Division, Mass Media Bureau, to Dennis Courtland Hayes, Esq. and Thomas J. Hutton, Esq.*, dated October 20, 1992 (*Hayes/Hutton Letter"*). For the reasons that follow, we affirm the staff action taken in the *Hayes/Hutton Letter* and deny NAACP's request for relief.

BACKGROUND

2. On October 3, 1988, Chapman S. Root Revocable Trust ("Root Revocable Trust") filed applications for renewal of licenses of the above-captioned stations. The Commission granted the renewal applications in two separate actions. *See Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683 (1990); and *Applications for Renewal of Licenses of Certain Broadcast Stations Serving Melbourne, Florida, and Other Communities in the Florida Area*, 5 FCC Rcd 6738 (1990).[2] NAACP timely filed petitions for reconsideration of the Commission actions on October 25, 1990, and December 5, 1990.

3. On November 25, 1990, following grant of the four renewal applications, Root Revocable Trust filed the above-captioned applications for assignment of licenses for the four radio stations. NAACP petitioned to deny the assignment applications on January 11, 1991. NAACP advanced essentially the same arguments in its Petition to Deny the assignment applications as it had proffered in its petitions for reconsideration of the Commission actions granting the renewal applications.

4. On September 17, 1992, the Commission denied NAACP's petitions for reconsideration and affirmed the grants of the four renewal applications. *See License Renewal Applications*, 7 FCC Rcd 6045 (1992). Approximately one month later, on October 20, 1992, the Commission staff issued the *Hayes/Hutton Letter* denying NAACP's Petition to Deny and granting the assignment of licenses from Root Revocable Trust to Root Living Trust. In relevant part, the *Hayes/Hutton Letter* stated:

> In view of the fact that the arguments set forth in the Petition to Deny the assignment applications involve the same issues which were resolved in the order disposing of the Petitions for Reconsideration, we find no basis upon which to deny the assignment applications.

5. NAACP's instant Application for Review of the *Hayes/Hutton Letter* consists, in its entirety, of four paragraphs. In relevant part, NAACP argues:

> [The *Hayes/Hutton Letter*] did not rule on the substantive contentions previously addressed in orders concerning the renewals of licenses of these radio stations. The NAACP continues to maintain that those renewals were improvidently granted . . . .
>
> For the reasons given in the NAACP's January 11, 1991, Petition to Deny . . . the Commission erred in granting the renewals. Since the applicant is unqualified for renewal, it has nothing to assign. *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).
>
> Accordingly, for the reasons provided in the Petition to Deny, the Commission should order the [assignment] applications into hearing.

6. In its Opposition, Chapman Living Trust maintains that NAACP's Application for Review is procedurally defective because: (a) it fails under § 1.115(b)(1) of the Commission's Rules to concisely and plainly state any questions for review; (b) it does not specify, pursuant to § 1.115(b)(2) of the Commission's Rules, any factor which would form a basis for Commission review; and (c) by relying solely on the arguments advanced in its Petition to Deny, NAACP is merely rehashing arguments which have already been considered and rejected. Chapman Living

[1] Station WWLV(FM) changed its call letters to WCFB(FM) on July 17, 1992. For purposes of clarity and consistency, we will herein refer to the station as WWLV(FM).

[2] The WNDB(AM) and WWLV(FM) license renewal applications were granted subject to reporting conditions and a Notice of Apparent Liability for forfeiture in the amount of $5,000. The WLKF(AM) and WEZY(FM) license renewal applications were granted subject to reporting conditions.

Trust also argues that the Application is devoid of any showing that reversal of the *Hayes/Hutton Letter* is warranted under the circumstances.

DISCUSSION

7. We believe that NAACP's Application for Review is procedurally defective and subject to dismissal for the following reason. Section 1.115(b)(2) of the Commission's Rules requires applications for review to:

> specify with particularity, from among the following, the factors which warrant Commission consideration of the questions presented:
>
> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedure error.

NAACP fails to identify any of the foregoing factors as the basis for its Application for Review. Moreover, the Application for Review does not even implicitly rely on any of the requisite factors as justification for seeking Commission relief.

8. NAACP argues that because the renewals of license for the captioned stations were erroneously granted, there is nothing to assign. To the extent this argument suggests that the pendency of NAACP's appeal of the renewal grants[3] undermines the effectiveness of the assignments, it is unavailing. Section 1.103 of the Commission Rules states that the filing of an appeal will not stay the effectiveness of a Commission decision. Consequently, because the Commission actions granting the license renewal applications remain in effect, there is no bar to favorable action on the assignment applications. We note in this regard that, as a matter of law, the assignee bears the consequences of any adverse determinations which might arise from the pending appeal.

9. There is one final independent basis for rejecting NAACP's Application for Review. To the extent NAACP makes any substantive arguments at all, those arguments are contained in NAACP's January 11, 1991, Petition to Deny the assignment applications, which is incorporated by reference. By incorporating the Petition to Deny by reference into the Application for Review, NAACP is doing nothing more than attempting to relitigate the same matters which we heretofore considered and rejected in *License Renewal Applications*. It is well established in this regard that the Commission will not grant rehearing "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorrain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

10. ACCORDINGLY, IT IS HEREBY ORDERED, That the Application for Review, filed by NAACP on November 18, 1992, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] *Florida State Conference of Branches of the NAACP v. FCC*, Case No. 92-1546, pending in the United States Court of Appeals for the D.C. Circuit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo	CSR-3767
County Community College	CA0107
District against	
Chambers Cable of Novato	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Chambers Cable of Novato ("Chambers"), had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses the system's principal headend at Novato, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Chambers Cable of Novato IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo	CSR-3770
County Community College District	CA0050
against Horizon Cable TV Video	
Engineering, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Horizon Cable TV Video Engineering, Inc. ("Horizon"), had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses the system's principal headend at Fairfax, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Horizon Cable TV Video Engineering, Inc. IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo	CSR-3771
County Community College District	CA0318
against Multivision-Yountville	
- Multivision Cable	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Multivision-Yountville - Multivision Cable ("Multivision"), operator of a cable television system serving Rohnert Park, California, had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses the system's principal headend at Rohnert Park, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by the San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Multivision-Yountville - Multivision Cable IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Mass Media Bureau

In re:

Complaint of the Central Washington Association for Public Telecommunications against TCI Cablevision of Wenatchee, Inc.	CSR-3752 WA0116
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 1, 1993, a petition on behalf of the Central Washington Association for Public Telecommunications, licensee of Station KYVE-TV (Educ., Channel 47), Yakima, Washington, was filed with the Commission claiming that TCI Cablevision of Wenatchee, Inc., ("TCI"), operator of a cable television system serving Wenatchee, Washington had declined to carry the station by letter dated January 7, 1993, even though the Grade B contour of KYVE-TV encompasses TCI's principal headend at Wenatchee, by means of the Television Broadcast Translator Station, K18AD, Wenatchee.

2. In its letter declining to carry KYVE-TV, TCI cited the *Standstill Order* and the litigation addressing the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) pending in *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992).

3. The *Standstill Order* deferred any Commission action regarding educational television stations' complaints of non-carriage for 120 days, or until an appealable order of the Court was entered. However, it did not preclude the filing of complaints regarding carriage disputes or delay the schedule for the filing of responsive pleadings. On April 8, 1993, the Court issued its opinion in this case upholding the provisions of the 1992 Cable Act and terminating the *Standstill Order*.

4. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed February 1, 1993, by Central Washington Association for Public Telecommunications IS GRANTED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Wenatchee, Inc. and IS ORDERED to commence carriage of KYVE-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Front Range Educational Media against United Artists Cable of Greeley	CSR-3783 CO0047

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On January 4, 1993, a petition was filed with the Commission on behalf of Front Range Educational Media, licensee of Station KBDI-TV (Educ., Channel 12), Broomfield, Colorado. According to KBDI-TV, the station is entitled to on-channel carriage by United Artist Cable of Greeley ("UAC") a cable television system serving Greeley, Colorado, because Broomfield is within fifty miles of the cable system's principal headend at Greeley, and therefore KBDI-TV is a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. In its letter declining to grant KBDI-TV's request for on-channel carriage, UAC notes the Commission's pending rule making proceeding which UAC states might help to clarify various broadcasters' conflicting demands to certain channel allocations on the system.

3. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1992), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and which terminated the 120 day *Standstill Order* previously issued in this case. In addition, on March 11, 1993, the Commission adopted its *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993), clarifying its rules on mandatory signal carriage.

4. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 4, 1993, by Front Range Educational Media IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and pursuant to §615(g)(5) of the 1992 Cable Act, United Artists Cable of Greeley IS ORDERED to carry Station KBDI-TV, Channel 12, Broomfield, Colorado, on channel, on its cable television system in Greeley, forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Valley Public Television, Inc. against UACC Midwest, Inc.

CSR-3744

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On December 4, 1992, the mandatory carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), became effective for certain noncommercial educational stations. On January 27, 1993, a complaint on behalf of Valley Public Television, Inc., licensee of Television Broadcast Station KVPT (Educ., Channel 18), Fresno, California, was filed with the Commission claiming that the station is entitled to carriage by the cable television system serving Merced, California, UACC Midwest, Inc., d/b/a TCI Cablevision of Merced County, ("TCI"), because the station's community of service is within fifty miles of TCI's headend at Cressey, California, as demonstrated by Attachment "B" of the complaint.

2. On April 14, 1993, TCI filed an opposition to the complaint, however, stating that Attachment "B", *supra*, clearly demonstrates that its headend at Cressey is entirely outside KVPT's Grade B contour, and that Cressey is more than fifty miles from any point within the boundaries of Fresno, KVPT's city of license. TCI adds that the "Declaration" submitted with the complaint does not constitute an affidavit, as prescribed by Commission rules.

3. In response, KVPT-TV submits a revised "Declaration" stating that it has not had a *specific* statement from TCI concerning the location of its single or multiple headends, and that since KVPT is the most local signal TCI can receive, the Commission should uphold its complaint under the spirit of the 1992 Cable Act and the promotion of local broadcasters.

4. Staff review of the issues raised and of the materials submitted in this matter fails to demonstrate either that TCI's headend lies within KVPT's Grade B contour or that TCI's headend is fifty miles or less from the reference point of KVPT's principal community. Therefore, the 1992 Cable Act does not entitle KVPT to mandatory carriage on the Merced cable television system, and the complaint filed January 27, 1993, by Valley Public Television, Inc. IS DISMISSED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Garden State Cablevision, L.P.	CSR-3804-M NJ0241
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Garden State Cablevision, L.P. ("Garden"), had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Cherry Hill, New Jersey, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. In its letter declining to carry WYBE, Garden noted the pendency of the Commission's *Notice of Proposed Rulemaking in MM Docket No. 92-259*, 7 FCC Rcd 8055 (1992), and concluded that it was premature for the system to change its channel line-up prior to the Commission's adoption of its proposed must-carry rules. Further, in a March 3, 1993 "Reply", Garden cited the outstanding *Standstill Order* and the pending litigation involving the constitutionality of the 1992 Cable Act in *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992).

3. On March 11, 1993, the Commission adopted its must-carry rules in the *Report & Order in MM Docket No. 92-259*, FCC 93-144 (released March 29, 1993). Subsequently, on April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

4. Accordingly, the basis for Garden's declining carriage of WYBE in its letter and reply no longer exist. Therefore, the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Garden State Cablevision, L.P. IS ORDERED to commence carriage of WYBE forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against C-Tec Cable Systems	CSR-3802-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that C-Tec Cable Systems ("C-Tec"), had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Dallas, Pennsylvania, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On March 18, 1993, C-Tec filed a motion for extension of time, in which it noted the pending litigation involving *Turner Broadcasting System, Inc., et al v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992). On April 13, 1993, C-Tec filed its opposition to the complaint stating that WYBE mistakenly identifies its principal headend as being located in Dallas, Pennsylvania. C-Tec asserts that its principal headend is actually located in Somerville, New Jersey, which is entirely outside WYBE's Grade B contour and 57.7 miles from WYBE's city of license. As a result, C-Tec contends that WYBE is not a "local" station, as defined by the rules, and it is not required to be carried on the system serving Morris, Hunterdon, and Sommerset, New Jersey.

3. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation concerning *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and which terminated the *Standstill Order* previously issued in this matter. However, staff review of the issues raised and of the materials submitted in this matter fails to demonstrate either that C-Tec's headend lies within WYBE's Grade B contour or that C-Tec's headend is fifty miles or less from the reference point of WYBE's principal community. Therefore, the 1992 Cable Act does not entitle WYBE to mandatory carriage on the C-Tec system served from Somerville, New Jersey, and the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS DISMISSED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Comcast Cablevision of Mercer County, Inc.	CSR-3801-M NJ0478
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Comcast Cablevision of Mercer County, Inc. ("Comcast"), had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Trenton, New Jersey, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On March 3, 1993, Comcast filed a "Reply", stating that it declined to carry Station WYBE on its system serving Mercer County pending the resolution of the *Standstill Order* and of the litigation involving the constitutionality of the 1992 Cable Act in *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992).

3. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

4. Accordingly, the basis for Comcast's declining carriage of WYBE in its reply no longer exists. Therefore, the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Comcast Cablevision of Mercer County, Inc. IS ORDERED to commence carriage of WYBE forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Storer Cable Public Communications of Gloucester County, Inc.	CSR-3800-M NJ0074
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Storer Cable Communications of Gloucester County, Inc. ("Storer"), had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Willingboro, New Jersey, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. In its letter declining to carry WYBE, Storer noted the pendency of the Commission's *Notice of Proposed Rulemaking in MM Docket No. 92-259*, 7 FCC Rcd 8055 (1992), and concluded that it was premature for the system to change its channel line-up prior to the Commission's adoption of the must-carry rules. Further, in a March 3, 1993 "Reply", Storer cited the outstanding *Standstill Order* and the pending litigation involving the constitutionality of the 1992 Cable Act in *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. December 4, 1992).

3. On March 11, 1993, the Commission adopted its must-carry rules in the *Report & Order in MM Docket No. 92-259*, FCC 93-144 (released March 29, 1993). Subsequently, on April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

4. Accordingly, the basis for Storer's declining carriage of WYBE in its letter and reply no longer exists. Therefore, the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Storer Cable Communications of Gloucester County, Inc. IS ORDERED to commence carriage of WYBE forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Monmouth Cablevision Associates

CSR-3805-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1993; Released: June 24, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Monmouth Cablevision Associates ("Monmouth"),[2] had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Seaside Heights, New Jersey, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case. However, staff review of the issues raised and of the materials submitted in this matter fails to demonstrate either that Monmouth's headend lies within WYBE's Grade B contour or that Monmouth's headend is fifty miles or less from the reference point of WYBE's principal community. Therefore the 1992 Cable Act does not entitle WYBE to mandatory carriage on the Monmouth cable television system serving Seaside Heights, New Jersey, and the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS DISMISSED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

[1] Although WYBE's petition was originally filed on February 23, 1993, it was not perfected and accepted for filing until April 16, 1993.

[2] WYBE identifies Monmouth in its petition as National Video Systems, Inc.; however, the address and phone number provided indicate that the system is in fact Monmouth.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Procedure for measuring electromagnetic emissions from intentional and unintentional radiators.	**GEN Docket Nos. 89-116 89-117 89-118**

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1993; Released: June 24, 1993

By the Commission:

I. INTRODUCTION

1. By this action, the Commission amends Part 15 of its Rules to adopt the American National Standards Institute's (ANSI) measurement procedure for determining compliance of intentional and unintentional radiators with Part 15 of the Rules. Specifically, we are incorporating into Part 15 by reference, ANSI C63.4-1992, entitled, "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz." Use of C63.4-1992 will update the Commission's measurement procedures consistent with provisions of the recent comprehensive revision of Part 15, reduce non-compliance of Part 15 devices tested by the Commission and allow manufacturers to obtain approvals for such products more quickly.

II. BACKGROUND

2. In the *First Report and Order* in General Docket 87-389, the Commission, *inter alia*, adopted new classifications for non-licensed radio frequency (RF) devices permitted to operate under Part 15 of the rules.[1] Two of these classes are intentional radiators, which intentionally generate and emit radio frequency energy by radiation or induction, and unintentional radiators, which generate radio frequency energy, but are not intended to emit RF energy by radiation or induction. While Part 15 provides general guidance on the procedures for testing equipment, the Commission recognized that more detailed procedures would be needed for testing certain categories of equipment or types of products. The original *Notice of Proposed Rulemaking* actions (*NPRMs)* in these proceedings proposed three new measurement procedures for testing Part 15 devices.[2] The procedures were for testing: 1) intentional radiators (designated TP-3); 2) unintentional radiators (designated TP-4); and, 3) transmitters with periodic operation and superregenerative receivers (designated TP-6). Based on the comments filed in response to the *NPRMs*, the Commission elected to initiate development of a consensus measurement procedure with industry. As the first stage of this process, the Commission subsequently adopted ANSI C63.4-1991 as the procedure for testing digital devices.[3] As the second stage of this process, ANSI subsequently expanded C63.4-1991 to cover most intentional and unintentional radiators. The updated standard is C63.4-1992, which was approved under ANSI's public review process. The *Further Notice of Proposed Rule Making (FNPRM)* in the subject dockets proposed to incorporate in the rules by reference ANSI C63.4-1992 as the measurement procedure for testing most intentional and unintentional radiators, including digital devices, transmitters with periodic operation, and superregenerative receivers.[4] American Telephone and Telegraph Company (AT&T), the National Association of Broadcasters (NAB), and Tandy Corporation filed comments in response to the *FNPRM*. No reply comments were received.

3. All three parties support the adoption of C63.4-1992. AT&T states that C63.4-1992 is a balanced, state-of-the-art procedure that appears to have broad-based industry support. NAB believes that it is a reasonable industry consensus, and it provides an accurate, repeatable, step-by-step method for evaluating a device's compliance with the Part 15 emission limits.

III. DISCUSSION

4. We continue to believe that it is appropriate to adopt ANSI C63.4-1992 as the procedure for measuring emissions from Part 15 intentional and unintentional radiators. ANSI C63.4-1992 is a consensus measurement procedure adopted after thorough input and analysis by manufacturers of intentional and unintentional radiators, test equipment manufacturers, measurement laboratories, communications users, and other technical experts. We note the absence of any objections to adoption of this standard as the measurement procedure to be used by the Commission for determining compliance of intentional and unintentional radiators with the Part 15 rules. The new standard includes several elements that will improve the accuracy and repeatability of measurements. For example, the 1992 standard includes two new sections containing specific information on testing intentional and unintentional radiators and a step-by-step measurement procedure. The new section on intentional radiators specifies procedures for measuring AC powerline conducted and radiated emissions, transmitter operating frequency, and frequency variation with respect to voltage and temperature. For intentional radiators that transmit pulsed emissions and are subject to average limits, a procedure is provided for measuring the transmitter duty cycle. The new section on

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[1] *See Report and Order* in General Docket 87-389, 4 FCC Rcd 3493 (1989).

[2] *See Notice of Proposed Rule Making* in General Docket No. 89-116, 4 FCC Rcd 5110 (1989) proposing to adopt TP-3; *Notice of Proposed Rule Making* in General Docket No. 89-118, 4 FCC Rcd 5143 (1989) proposing to adopt TP-4; and *Notice of Proposed Rule Making* in General Docket No. 89-117, 4 FCC Rcd 5174 (1989) proposing to adopt TP-6.

[3] *See Report and Order* in General Docket 89-44, 7 FCC Rcd 3128 (1992). Digital devices are a specific type of unintentional radiator.

[4] *See Further Notice of Proposed Rule Making* in General Dockets 89-116, 89-117, and 89-118, 7 FCC Rcd 5199 (1992).

unintentional radiators specifies procedures for measuring AC powerline conducted and radiated emissions, output signal levels from TV interface devices, and isolation between antenna transfer switch ports.

5. Because the standard is clear and results will be repeatable, we anticipate an improved compliance rate for products submitted to the Commission for testing. The improved compliance rate will help reduce delays in marketing that result when a product is found not to meet FCC standards. We also note that adoption of this standard may help advance the acceptance of U.S. products and test data internationally because the standard is consistent with internationally accepted measurement practices.[5]

6. We therefore conclude that ANSI C63.4-1992 satisfies the need for new measurement procedures stemming from the revision of Part 15 in General Docket 87-389. Accordingly, we find it in the public interest to amend Part 15 of the rules to incorporate by reference ANSI C63.4-1992 as the measurement procedure for intentional and unintentional radiators. This action is consistent with the intent of Office of Management and Budget (OMB) Circular A-119, which urges government agencies to use industry developed standards rather than develop their own. Consistent with our previous action regarding the digital device measurement procedure, we are delegating authority to the Chief Engineer to modify the rules to reference future versions of C63.4 that do not raise substantive compliance issues.[6]

7. As proposed, we are not adopting Sections 5.7, 9, and 14 of C63.4-1992, dealing with use of the absorbing clamp, relaxation for clicks, and use of the artificial hand. We believe that the use of an artificial hand adds complexity to testing, and there is insufficient evidence to show that it allows an accurate or repeatable measurement of the emission levels from a device. We also will not accept absorbing clamp measurements as a substitute for measuring radiated emissions as provided in Section 9. The Commission's limits are based on measurements of radiated emissions. There is no evidence to show that the results obtained with an absorbing clamp can be correlated with radiated emissions from electronic equipment. Finally, we do not propose the relaxation of the limits for "click" or short duration emissions as provided in Section 14. Short duration emissions can produce as much nuisance to radio communications as continuous emissions.

8. Tandy requests that the Commission incorporate directly into its Rules any standards manuals referenced in C63.4-1992, such as ANSI C63.5-1988 and CISPR Publication 16.[7] As we previously stated in the *Report and Order* in General Docket 89-44, we will treat updates to the standards referenced in C63.4-1992 in the same manner" as updates to C63.4-1992 itself.[8] That is, any changes to the industry standards referenced in C63.4-1992 will be accepted by the Commission only upon appropriate action by the Chief Engineer or by rule making by the Commission. We do not believe it is necessary to specifically incorporate each individual standard referenced into the rules.

9. We are also adopting the test site performance criteria in ANSI C63.4-1992 as a replacement for the currently used Bulletin OET 55. Specifically, we are amending Section 2.948 to require submission of both horizontal and vertical site attenuation data showing compliance with the performance criteria in ANSI C63.4-1992 for test sites used to perform measurements on intentional and unintentional radiators. We believe this will have little impact on industry because most existing test facilities are likely to meet the standard. Prior to performing measurements using C63.4-1992, the party performing the measurements must file an updated test site description, unless one was previously filed to show compliance with C63.4-1991. The updated description must include the new site attenuation data, and photographs and a dimensioned diagram of the line conducted test setup.

10. The test procedure for digital devices in ANSI C63.4-1992 is largely the same as C63.4-1991. The most substantial change is that the use of a conductive wall behind the equipment under test during AC line conducted emission testing is optional rather than mandatory when measurements are performed on an open field test site. In addition, a section on the antenna positioner for radiated testing has been added. These changes will have little, if any, impact on parties making measurements on digital devices. We believe that it would be preferable for most laboratories to have available a single document that covers testing of digital devices, as well as intentional and unintentional radiators. We, therefore, are adopting C63.4-1992 for testing digital devices as proposed in the *FNPRM*.

11. While ANSI C63.4-1992 covers measurement procedures for most Part 15 devices, we observe that certain measurements are not addressed. Specifically, ANSI C63.4-1992 does not include procedures for measurement of radiated emissions below 30 MHz, or for measurements on spread spectrum transmitters. These two areas present technical issues that are not yet completely resolved. Additional procedures addressing these areas may be added to C63.4 in the future. We note that our proposals did not address such measurements. Until such time as specific measurement procedures are developed, we will apply only the general measurement guidance currently contained in Sections 15.31 through 15.35 of the FCC Rules.

12. Parties performing measurements are encouraged to use C63.4-1992 as soon as practical after it is incorporated by reference into the rules. However, we recognize that a time period for transition to the new measurement procedure and test site requirements is necessary. Therefore, we are implementing the use of C63.4-1992 for

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[5] For example, ANSI C63.4-1992 employs measurement methods generally consistent with CISPR Publication 16 (CISPR Specifications for Radio Interference Measuring Apparatus and Measurement Methods, 2nd ed.) and CIPSR Publication 22 (Limits and Methods of Measurement of Radio Interference Characteristics of Information Technology Equipment).

[6] *See Report and Order* in General Docket 89-44, 7 FCC Rcd 3128 (¶17).

[7] *See* ANSI C63.5-1988, American National Standard for Calibration of Antennas Used for Radiated Emissions Measurements; and CISPR Publication 16 (1987), CISPR Specifications for Radio Interference Measuring Apparatus and Measurement Methods, 2nd ed.

[8] *See Report and Order* in General Docket 89-44, 7 FCC Rcd 3128 (1992) (¶18).

equipment other than digital devices, for which verification is obtained, or for which an application for equipment authorization is filed, on or after June 1, 1995. Digital devices are still subject to the transition provisions set forth in the *Report and Order* in Docket 89-44.[9]

IV. FINAL REGULATORY ANALYSIS

13. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is necessary to provide specific information on how the Commission will test intentional and unintentional radiators. We believe it is necessary to incorporate the test procedure into the Rules by reference to provide adequate notice to the public of the measurement procedure that will be used by the Commission.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The Commission has considered the alternatives proposed in the *NPRMs* and *FNPRM* and all timely filed comments. The only significant alternative would be to proceed with the adoption of TP-3, TP-4 and TP-6, with modifications based on the record. However, we believe that the use of C63.4-1992 is the best course because it represents an industry consensus.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, Part 2 and Part 15 ARE AMENDED as set forth in Appendix A below, effective thirty days after publication in the Federal Register. IT IS FURTHER ORDERED that these proceedings ARE TERMINATED.

15. For further information, contact Mr. Hugh L. Van Tuyl at the FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585, extension 221.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r) and 307, unless otherwise noted.

2. Section 2.948 is amended by revising paragraph (b)(8) to read as follows:

Section 2.948 Description of measurement facilities.

* * * * *

(b) * * *

(8) A plot of site attenuation data.

(i) For a measurement facility that will be used for testing radiated emissions from a digital device on or after May 1, 1994, or for testing intentional and other unintentional radiators authorized under Part 15 of the rules on or after June 1, 1995, the site attenuation data shall be taken pursuant to the procedures contained in Sections 5.4.6 through 5.5 of the following procedure: American National Standards Institute (ANSI) C63.4-1992, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on July 17, 1992 as document number SH15180. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of ANSI C63.4-1992 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, Telephone 1-800-678-4333. Copies of ANSI C63.4-1992 may be inspected at the following locations:

(A) Federal Communications Commission, 2025 M Street, N.W., Office of Engineering and Technology (Room 7317), Washington, DC 20554,

(B) Federal Communications Commission Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, or

(C) Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, DC 20488.

(ii) For a measurement facility that will be used for testing radiated emissions from a digital device prior to May 1, 1994, or from intentional and other unintentional radiators authorized under Part 15 prior to June 1, 1995, or for devices authorized under Part 18 of the rules, the

[9] *Id.* (¶22).

site attenuation data shall be taken pursuant to either ANSI C63.4-1992, Sections 5.4.6 through 5.5, or FCC/OET Bulletin 55.

(iii) This requirement does not apply to equipment that is not measured on an open field test site.

* * * * *

Part 15 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 15 - RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 154(i), 302, 303, 303(r), 304 and 307.

2. Paragraph (a) of Section 15.31 is revised to read as follows:

Section 15.31 Measurement standards.

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements in this Part. Except where noted, copies of these procedures are available from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office at 202-632-7000.

(1) FCC/OET MP-1: FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers. Note: This procedure may be used only for testing devices for which verification is obtained, or for which an application for equipment authorization is filed before June 1, 1995. For compliance testing of these devices after that date, see 15.31(a)(6) of this section.

(2) FCC/OET MP-2: Measurement of UHF Noise Figures of TV Receivers.

(3) FCC/OET MP-3: FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics, and Radio Noise Emissions from TV Interface Devices. Note: This procedure may be used only for testing devices for which verification is obtained, or for which an application for equipment authorization is filed before June 1, 1995. For compliance testing of these devices after that date, see 15.31(a)(6) of this section.

(4) FCC/OET MP-4 (1987): FCC Procedure for Measuring RF Emissions from Computing Devices. Note: This procedure may be used only for testing digital devices for which verification is obtained, or for which an application for equipment authorization is filed before May 1, 1994. For compliance testing of digital devices on or after May 1, 1994, see 15.31(a)(6) of this section.

(5) FCC/OET MP-9: FCC Procedure for Measuring Cable Television Switch Isolation. Note: This procedure may be used only for testing devices for which verification is obtained, or for which an application for equipment authorization is filed before June 1, 1995. For compliance testing of these devices after that date, see 15.31(a)(6) of this section.

(6) Digital devices for which verification is obtained, or for which an application for equipment authorization is filed on or after May 1, 1994, and intentional and other unintentional radiators for which verification is obtained, or for which an application for equipment authorization is filed on or after June 1, 1995 are to be measured for compliance using the following procedure excluding Section 5.7, Section 9 and Section 14: American National Standards Institute (ANSI) C63.4-1992, entitled "Methods of Measurement of Radio-Noise Emissions from Low- Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on July 17, 1992, as document number SH15180. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The Commission encourages the use of this procedure for testing digital devices, intentional radiators, and other unintentional radiators as soon as practical. Copies of ANSI C63.4-1992 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331. Telephone 1-800-678-4333. Copies of C63.4-1992 may be inspected during normal business hours at the following locations:

(i) Federal Communications Commission, 2025 M Street, N.W., Office of Engineering and Technology (Room 7317), Washington, DC 20554.

(ii) Federal Communications Commission Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, or

(iii) Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, DC 20488.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1993

CONSUMER ALERT

TOLL FRAUD RISKS DURING THE VACATION SEASON
Fourth in a Series

The vacation season presents an increased risk of toll fraud for telecommunications consumers. Any person or business can fall victim to toll fraud, and we urge all consumers to take exceptional precaution during the vacation season to avoid additional risks.

RISKS AND RECOMMENDATIONS FOR INDIVIDUAL CONSUMERS

Because of vacation-related travel, individual consumers will be making more calls from telephones in public locations, such as airports, train stations, bus terminals, resorts, and campgrounds. Many of these calls will be placed using calling cards issued by a local or long distance telephone company. Unauthorized people may try to obtain calling card and personal identification numbers by watching callers dial these numbers or by overhearing the numbers being read to an operator at a public pay telephone. The cards themselves may also be lost through theft or loss of a wallet or purse. In addition, when individual consumers are away on vacation, unauthorized people may attempt to have providers of telephone services bill for "third-number" calls to home phone lines that are being answered by an answering machine.

Precautions. While traveling, consumers can take a number of steps to prevent toll fraud:

1) Use a telephone that reads your calling card number from the magnetic strip on the back of the card. If this type of telephone is unavailable, take steps to prevent others from watching you dial your card number or overhearing you give your number to an operator. In general, never give your calling card number to any unknown person.

2) Immediately report a lost or stolen calling card to the local or long distance telephone company that issued it. The company will cancel your card and issue you a new one.

3) Avoid using your telephone calling card as identification for consumer purchases or cashing checks.

4) Consider disabling your answering machine or recording a message for your answering machine stating your refusal to accept third-number billing.

RISKS AND RECOMMENDATIONS FOR BUSINESSES

During the vacation season, when many businesses are only partially staffed because of employee vacations, telecommunications systems may be targets of fraudulent calling because the systems are not fully monitored or secured. These systems, including private branch exchange (PBX) and voice mail equipment, may, through remote access or other features, allow incoming callers to receive a new dial tone for outgoing calls. Unauthorized people may try to use the systems to place outgoing calls or arrange third-number billing. In either case, the calls would be billed to the system owner.

Precautions. Businesses can take several steps to protect their systems from toll fraud:

1) Disable or otherwise restrict the remote access, voice mail, and other features of your telecommunications system that could allow outgoing calls. Disable or restrict these features whenever they will not be in use for business purposes, especially during vacation season, weekends, and at other times when employees will not need them. Consider whether these features will be required at all for business purposes during the vacation season.

2) Change the passwords and authorization codes used for remote access, voice mail, administrative, and other purposes. Unauthorized people may have already discovered your current passwords and codes and are waiting until the vacation season, when your staffing is at a low level, to use those passwords and codes for fraudulent calls. Change passwords and codes frequently throughout the year.

3) Monitor calling through your telecommunications system on a regular and frequent basis during the vacation season. Frequent monitoring is one of the best ways at any time of the year to quickly detect unauthorized calling.

4) Route incoming calls to a live operator or receptionist, if staffing permits, rather than to the automated attendant that usually answers your calls. An operator or receptionist may be able to assist in detecting unauthorized calls during this time of increased fraud risk.

5) Contact your equipment vendor, your local telephone company, and your long distance telephone company to determine what security systems are available to protect your equipment and telephone service from toll fraud, and what monitoring services are available to help you quickly detect unusual usage.

PRECAUTIONS MUST BE PERMANENT

Unfortunately, the risk of toll fraud does not end with the conclusion of the vacation season. We advise individual consumers and businesses to take precautions even after the vacation season is over. We have outlined additional toll fraud precautions in previous "Consumer Alert" Public Notices issued on April 19, 1991, June 9, 1992, and December 17, 1992. Copies can be obtained by writing to the FCC, Informal Complaints Branch, Enforcement Division, Common Carrier Bureau, 2025 M Street, N.W., Suite 6202, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association — Transmittal Nos. 541, 557

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: June 9, 1993; **Released: June 9, 1993**

By the Associate Bureau Chief, Common Carrier Bureau:

1. On March 12, 1993, the National Exchange Carrier Association, Inc. (NECA) filed Transmittal No. 541 to clarify the application of Universal Service Fund (USF) and Lifeline Assistance (LA) charges by providing a new definition of the term "interexchange carriers" (IXCs).[1] The filing clarifies NECA's current practice of aggregating presubscribed lines in all study areas of all affiliated IXC customers. Description and Justification at 2. NECA would sum all presubscribed lines served by companies under "common control" to determine which IXCs should be assessed USF and LA charges, based upon a definition of IXCs which is derived from § 32.9000 of the Commission's Rules, 47 C.F.R. § 32.9000.[2] NECA filed Transmittal No. 557 on June 1, 1993 to revise Transmittal 541 and add language clarifying that otherwise non-affiliated carriers with agreements to share transmission facilities or services would not be treated as affiliated.[3]

2. America's Carriers Telecommunications Association (ACTA) filed a petition on March 31, 1993, to reject or, alternatively, to suspend and investigate Transmittal 541. NECA filed a reply on April 8, 1993. ACTA argues that Transmittal 541 contravenes the Commission's USF and LA policies and Sections 69.116 and 69.117 of the Commission's rules, 47 C.F.R. §§ 69.116, 69.117, and are unjust, unreasonable and unreasonably discriminatory, in violation of Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201-202. ACTA Petition at 1-3. ACTA argues that NECA's IXC definition in effect revises the eligibility criterion for assessing USF and LA charges, *i.e.*, changes the rule that only IXCs with more than .05 percent of total presubscribed lines in all study areas must pay USF and LA charges. *Id.* at 2-3. ACTA contends that aggregating IXCs under a theory of "common control" removes the protection for small IXCs that the Commission designed into the eligibility threshold. *Id* at 4. ACTA also argues that NECA is making unauthorized "common control" determinations that only the Commission should make. *Id* at 5-9. ACTA also contends that it is inappropriate to use the Part 32 definition of "control." *Id.* at 9-10. Finally, ACTA argues that allowing the transmittal to take effect unfairly prejudices ACTA members who are currently involved in aggregation disputes with NECA. *Id.* at 10. According to ACTA, it is questionable whether IXCs could pursue their disputes through the complaint process because NECA may not be subject to Section 208 complaints. *Id.* at 10-11.

3. In its reply, NECA argues that aggregation of commonly controlled presubscribed lines has been a part of the USF and LA billing rules since their inception. NECA Reply at 3. NECA argues that it is required to make preliminary determinations regarding IXC qualification, including whether particular IXCs are under common control, and that its authority to do so is inherent in its responsibilities as administrator of the USF and LA programs. *Id.* at 3-4. NECA contends it is merely interpreting existing Commission rules on the proper billing of IXCs. *Id.* at 4.[4] NECA suggests that the same standard applies to initial qualifications as to subsequent reorganizations. *Id.* at 3, n.3. NECA argues that its derivation of the Part 32 definition of IXCs is reasonable in the absence of the Commission specifying a particular standard in the *PSL Billing Order*, and points out that if the Commission determines that NECA's interpretation is incorrect, it may issue a definitive interpretation at any time. *Id.* at 4. Finally, NECA argues that ACTA's concerns regarding resolution of pending disputes are without merit because NECA is merely clarifying existing tariff provisions. *Id.* at 5-6.

4. The Common Carrier Bureau has reviewed NECA Transmittal Nos. 541 and 557, and all related submissions. We conclude that no compelling argument has been

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[1] NECA collects these rates from the largest interexchange carriers (IXCs) on the basis of each IXC's total number of presubscribed lines. NECA then distributes these funds to promote affordable telephone service among high cost LECs and low income subscribers.

[2] In Transmittal 541, NECA proposes to revise Section 8.1 (E) of its Tariff F.C.C. No. 5 to include the following definition:

> IXCs shall be deemed to be "affiliated" where one IXC directly or indirectly controls another IXC, or where there is direct or indirect common control of two or more IXCs. "Control" (including the terms ["controlling,"] "controlled by," and "under common control with") means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermedia[ry] companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means.

[3] That clarifying language is as follows:

> An agreement among otherwise non-affiliated IXC customers that provides for the joint use of transmission facilities or services, but does not grant any right to control the management and policies of any of the contracting IXCs, shall not result in a finding of common control or affiliation under this provision.

[4] *Citing*, Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, Memorandum Opinion and Order, 4 FCC Rcd 6134, 6137 (1989)(*PSL Billing Order*).

presented that the tariff is patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or, alternatively, to suspend and investigate National Exchange Carrier Association, Inc., Tariff No. 5, Transmittal No. 541, filed by America's Carriers Telecommunications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies Corporation Revisions to GTOC Tariff F.C.C. No. 1 — Transmittal No. 783

ORDER

Adopted: June 14, 1993; Released: June 15, 1993

By the Associate Bureau Chief, Common Carrier Bureau:

1. On April 19, 1993, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 783, establishing Micronesian Telecommunications Corporation (MTC), as an issuing carrier in GTOC Tariff F.C.C. No. 1. MTC serves the Commonwealth of the Northern Marianas Islands (CNMI), comprising the islands of Saipan, Tinian, and Rota, with both local exchange and interexchange service.[1] GTOC/MTC Transmittal 783, scheduled to become effective June 17, 1993, establishes that carrier's first interexchange switched access tariff, and also reflects the conversion of GTOC/MTC central offices to equal access capability. GTOC/MTC filed an addendum April 30, 1993 providing additional cost information specifically supporting its access rates, including a cost separations study and a study showing the allocation of costs to access rate elements pursuant to Part 69 of the Commission's Rules.

2. On May 13, 1993, IT&E Overseas, Inc. (IT&E) filed a petition to suspend and investigate and to reject in part, followed by an erratum May 14, 1993. GTOC/MTC replied, accompanied by a motion to accept its late-filed reply, on May 28, 1993.[2] IT&E contends that GTOC/MTC, in implementing and tariffing equal access in the CNMI, will employ a "non-standard" version of Feature Group D (FGD) that will not work with IT&E's counterpart FGD software. IT&E Petition at 8-11 and Exh. 8, 9, 10. IT&E asserts as a consequence that GTOC/MTC should be directed to file a non-premium access rate until full software compatibility is established, and also to adjust its premium rates to reflect the costs incurred by IXCs to modify switch software. *Id.* at 3-4. IT&E also seeks a 30-day suspension of the transmittal in all respects other than the rejection contentions noted below, and the interim application of a non-premium rate, to enable it to modify its FGD software to operate with the GTOC/MTC counterpart switches. *Id.* at 18. IT&E then contends that the proposed access charges have been overstated by between 30 and 50 percent on a rate element by rate element basis and are unjust and unreasonable. It proposes an alternative rate schedule. *Id.* at 5-8 and Exh. 5-6.

3. IT&E urges rejection of two rate elements established by the transmittal. As to the terminating carrier common line (CCL) rate, IT&E states that the failure of GTOC/MTC to average that rate with other GTOCs, raises it to "an outrageous level." IT&E also challenges the mileage sensitive transport charge, applied to calls originating and terminating off the main island of Saipan, as unjust and unreasonable. *Id.* at 15-17. Finally, IT&E urges the Commission to investigate the type and degree of separation or other safeguards to be established between GTOC/MTC's local and long distance functions, its relation with Hawaiian Telephone Company, and its cellular and customer premises equipment operations. *Id.* at 19-22.

4. GTOC/MTC replies that arguments over technical difficulties have been mooted by the successful testing of the GTOC/MTC arrangement with IT&E's switch, and asserts it has reasonably adapted equal access to the CNMI, given its location outside the North American Numbering Plan. GTOC/MTC Reply at 3-7. GTOC/MTC also urges the Commission to consider only those remedies urged by petitioner that entail relief properly considered in a tariff review proceeding, and not to consider IT&E's concerns regarding the terminating CCL rate. *Id.* at 11-12. Similarly, according to GTOC/MTC, ordering GTOC to file non-premium access rates, as IT&E urges, fails to recognize that all GTOC/MTC offices will be converted to equal access coincident with the tariff's effective date. *Id.* at 8-9. GTOC/MTC asserts that the purported discrepancy between its Dial Equipment Minutes (DEM) and access minutes used to develop rates reflects the greater non-conversation time experienced in providing international calls, which are a greater portion of GTOC/MTC interexchange traffic than for mainland carriers. *Id.* at 10-11. As to the local transport rate, GTOC/MTC states that its structure comports with established mainland practice and Section 69.111(b) of the Commission's Rules. *Id.* at 12-14. Citing the unique circumstances of the CNMI, GTOC/MTC asserts that its cost support complies with Commission requirements. Finally, GTOC/MTC avers that it will assess its international operations access charges on a tariffed basis and reflect these transfers in the GTOC/MTC and MTC accounts. *Id.* at 15-22.

5. The Common Carrier Bureau has reviewed GTE Telephone Operating Companies Transmittal No. 783, IT&E's petition, and GTOC/MTC's reply. We conclude that the transmittal is not so patently unlawful as to require rejection and that no investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that GTOC/MTC's motion to accept its late-filed reply IS GRANTED.

7. IT IS FURTHER ORDERED that the petition to reject GTE Telephone Operating Companies Transmittal No. 783, filed by IT&E Overseas, Inc., IS DENIED.

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[1] Hereinafter we refer to the local exchange operations of the carrier as GTOC/MTC to distinguish them from the commonly owned interexchange operation, referred to as MTC.

[2] GTOC/MTC claims in its motion that the need to coordinate its reply with the Micronesian Telecommunications Corporation in the CNMI made it unable to meet the deadline for filing its reply. Having demonstrated good cause for the delay in filing, we grant GTOC/MTC's motion.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-56

In the Matter of

Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for Mobile-Satellite Services in the 1530-1544 MHz and 1626.5-1645.5 MHz Bands — RM-6459

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1993; Released: June 11, 1993

Comment Date: September 8, 1993
Reply Comment Date: October 8, 1993

By the Commission:

INTRODUCTION

1. By this action, 33 MHz of spectrum at 1530-1544 and 1626.5-1645.5 MHz are allocated to the mobile-satellite service (MSS).[1] Additionally, 5 megahertz at 1525-1530 MHz are proposed to be allocated to the MSS. These actions implement changes the United States sought and achieved at the 1992 World Administrative Radio Conference (WARC-92), place the United States on a par with other countries that are advancing MSS systems, and facilitate international coordination for use of this spectrum.

BACKGROUND

2. In the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, we proposed to allocate the 1530-1544 and 1626.5-1645.5 MHz bands to the MSS on a co-primary basis with the maritime mobile-satellite service (MMSS).[2] We proposed this allocation for generic MSS, rather than the more limited land mobile-satellite service (LMSS) that had been adopted internationally at the 1987 World Administrative Radio Conference (MOB-87),[3] to provide flexibility to new satellite service providers in developing systems designed to meet the needs of all mobile users. We observed that a generic MSS allocation in these bands would be consistent with our treatment of the adjacent bands and permit operation by the aeronautical mobile-satellite service (AMSS), the MMSS, and the LMSS. Additionally, we proposed to require that MMSS distress and safety communications have priority access with real-time preemptive capability throughout the subject bands.

3. At WARC-92, the following international allocations were adopted that are consistent with our proposal:[4] 1) the 1525-1530 MHz band was allocated in Region 2 (the Americas)[5] to the MSS on a co-primary basis with the space operation service;[6] and 2) the 1530-1544 and 1626.5-1645.5 MHz bands were allocated in seven countries, including the United States, to the MSS on a primary basis[7] subject to conditions requiring priority access for MMSS distress and safety communications.[8]

DISCUSSION

1530-1544 and 1626.5-1645.5 MHz Allocation

4. In the *Notice*, we proposed to allocate the 1530-1544 and 1626.5-1645.5 MHz frequency bands for generic MSS. We indicated that sharing among the services in these bands is feasible and will best serve the public interest. We stated that our proposal provides sufficient safeguards to ensure that important maritime distress and safety needs are fully met and protected. In this regard, we proposed to require priority access with real-time preemptive capability throughout the subject bands for maritime distress and

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[1] The mobile-satellite service is a radio communication service between mobile earth stations (located on land, at sea or in the air) and one or more space stations.

[2] *Notice of Proposed Rule Making*, GEN Docket No. 90-56, 5 FCC Rcd 1255 (1990). The *Notice* responded, in part, to a Petition for Rule Making filed by Geostar Messaging Corporation (GMC), RM-6459.

[3] MOB-87 allocated the 1530-1533 and 1631.5-1634.5 MHz bands for the LMSS on a co-primary basis with the MMSS and the 1533-1544, 1626.5-1631.5 and 1634.5-1645.5 MHz bands to the LMSS on a secondary basis for non-speech low bit-rate data transmissions. The United States took a formal reservation on these decisions and stated its intention to utilize the bands to satisfy its MSS requirements, while recognizing the priority of maritime safety communications.

[4] The additional MSS bands allocated by WARC-92 will be addressed in a subsequent proceeding. *See* ITU *Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (WARC-92)* (Malaga-Torremolinos, 1992) (*WARC-92 Final Acts*).

[5] This band also was allocated to the MSS in Region 3 on a co-primary basis with the space operation and fixed services.

[6] The space operation service is concerned exclusively with the operation of spacecraft, in particular space tracking, space telemetry and space telecommand.

[7] *See* international *Radio Regulation* 726C (RR 726C). The MSS is allocated on a primary basis at 1626.5-1631.5 MHz and on a co-primary basis with: 1) the space operation service, MMSS and LMSS at 1530-1533 MHz; 2) the space operation service and MMSS at 1533-1535 MHz; 3) the MMSS at 1535-1544 and 1634.5-1645.5 MHz; and 4) the MMSS and LMSS at 1631.5-1634.5 MHz.

[8] RR 726C provides that MSS services operating on these frequencies are subject to the following conditions: "maritime mobile-satellite distress and safety communications shall have priority access and immediate availability over all other mobile-satellite communications operating under this provision. Communications of mobile satellite system stations not participating in the global maritime distress and safety system (GMDSS) shall operate on a secondary basis to distress and safety communications of stations operating in the GMDSS. Account shall be taken of the priority of safety-related communications in the other mobile-satellite services."

safety communications and sought comment on the manner by which this priority could be provided and the means of coordinating MSS and MMSS operations.

5. The record submitted in response to the *Notice* demonstrates an increasing demand for MSS services.[9] GMC cites an independent study that predicts 2 million MSS terminals worldwide by the end of 1994 and a total market of $6.65 billion, including $2.6 billion in the United States. Pacific Communications Sciences, Inc. (PCSI) predicts that a significant market will develop this decade if manufacturers can build terminals at attractive prices and if the MSS spectrum allocation is sufficient to meet the demand for mobile services. American Mobile Satellite Corporation (AMSC) contends that the growing demand for MSS in the United States will require at least the addition of this spectrum to support domestic MSS requirements. Defense Systems, Inc. (DSI) also anticipates a growing demand for MSS services, including voice and data messaging. The Federal Aviation Administration (FAA) states that the proposed allocation is critical to the aeronautical community because the current MSS frequencies will be utilized fully for safety communications for extended periods. The Coast Guard also supports allocation of spectrum for a generic MSS, stating that INMARSAT cannot meet all of the Coast Guard's requirements for command and control communications.

6. The parties do not agree on the feasibility of coordinating MSS and MMSS operations. AMSC and Orbital Communications Corporation (Orbcomm) state that sharing these bands is feasible and practicable. Aeronautical Radio, Inc. (ARINC) similarly submits that it has long advocated sharing MMSS spectrum for land mobile satellite uses because maritime and land mobile uses are geographically separated. ARINC concludes that these bands are ideally suited for sharing by AMSS, MMSS, and MSS. On the other hand, the American Institute for Merchant Shipping (AIMS) expresses concern that such sharing could detrimentally affect the successful operation of maritime satellite distress and safety communications. Similarly, COMSAT, while expressing general support for the development of domestic MSS systems, recommends that different frequency bands be used because sharing these bands with MSS could endanger maritime safety and cause irremediable interference to users of INMARSAT's MMSS satellite system.

7. In the *Notice*, we stated that requiring priority access with real-time preemptive capability in a manner identical to our requirements that apply to sharing aeronautical mobile-satellite (R) bands with MSS would ensure that the requirements of MMSS distress and safety communications are fully met.[10] A number of parties with maritime communications interests express doubt that real-time preemptive access is feasible.[11] These parties argue that the proposed real-time, priority access scheme may not be workable in the context of multiple MSS satellite systems. The Coast Guard submits that the technical means for implementing such access would be difficult and complex. Furuno adds that if equipment additional to, or different from, that used for INMARSAT access is required to implement real-time preemptive access, foreign vessel use of the frequencies will be denied. ARINC and AIMS request that MSS licensees be required to incorporate and demonstrate the means of providing real-time, priority preemptive access.

8. On the other hand, AMSC agrees that we should condition the authorization upon the system's provision of appropriate preemption for maritime safety communications. AMSC argues that such a condition will permit licensees to work informally with the Coast Guard and others to determine the appropriate percentage of the system's capability that should be set aside for preemptive access.[12] GMC also supports adopting the proposed access requirements and argues that they are sufficient to protect GMDSS. Similarly, Orbcomm states that real-time preemptive access is desirable and practical.

9. We conclude that projected demand warrants allocation of the proposed bands to the MSS. We believe that expanding the domestic allocation for the MSS will provide the public with new and additional voice and data services while fully protecting safety communications. Therefore, we are allocating the 1530-1544 and 1626.5-1645.5 MHz bands to the mobile-satellite service on a co-primary basis with the maritime mobile-satellite service.

10. We recognize the need to ensure the operation of maritime safety and distress communications, and therefore are adopting requirements that will fully safeguard such communications. In a prior action we required that priority and preemptive access be accorded aeronautical safety communications in the adjacent MSS bands.[13] The licensee of the adjacent bands, AMSC, indicates that it is designing its MSS system to provide the required priority access and real-time preemptive capability.[14] We conclude that an identical requirement for the new bands is feasible and will protect maritime distress and safety communications. Therefore, we will apply the identical requirement to MSS use of the bands allocated by this *Report and Order*.[15] Communications of MSS stations not

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[9] *See also* summaries of the record developed in preparation for WARC-92, *Second Notice of Inquiry*, GEN Docket No. 89-554, 5 FCC Rcd 6046 at 6054 (1990); *Report*, 6 FCC Rcd 3900 at 3908 (1991).

[10] *See Report and Order*, GEN Docket No. 84-1234, 2 FCC Rcd 1825 (1986).

[11] These parties include COMSAT, FURUNO U.S.A., Inc. (Furuno), the Maritime Administration of the Department of Transportation (Maritime Administration), the National Marine Electronics Association (NMEA), the National Ocean Industries Association (NOIA) and IDB Communications Group, Inc. (IDB).

[12] AMSC Reply at 10. AMSC originally recommended that the protection of safety communications be limited to priority access rather than preemption. AMSC argued that safety communications will virtually never face blocking on its system and if preemption is deemed necessary at a later date, it could be implemented readily since the relevant hardware and software are located at the ground facilities. AMSC at 17.

[13] *See* note 10, *supra*.

[14] *See* Report of AMSC's Chief Scientist on matters involving the provision of aeronautical mobile-satellite (R) service, dated November 24, 1992. A copy of this report is in the file of GEN Docket No. 90-56.

[15] At WARC-92 the United States proposed that maritime mobile-satellite distress and safety communications have priority access with real-time preemptive capability in the mobile-satellite service. However, the conference instead specified "priority access and immediate availability." Preemption is one of several techniques that a licensee may

providing such access and not participating in the global maritime distress and safety system (GMDSS) will be permitted to operate only on a secondary basis.[16]

Proposed Additional Allocation

11. At WARC-92, the United States proposed that the 1525-1530 MHz band be allocated to MSS on a co-primary basis with the space operation service for space-to-Earth operations.[17] This proposal was adopted for Regions 2 and 3.[18] Currently this spectrum is part of the much larger 1435-1530 MHz band allocated to aeronautical telemetering on a primary basis. We do not believe it technically feasible for aeronautical telemetering and MSS to operate in the 1525-1530 MHz band on a co-primary basis, and therefore, propose to reallocate the 1525-1530 MHz band on a primary basis to MSS and on a secondary basis to aeronautical telemetering without grandfathering existing users. This allocation would permit enhanced efficiency of future MSS operations in these bands by equalizing the amount spectrum in the uplink and downlink bands available for MSS communications. We seek comment on this addition to the MSS bands.

Low-bit Rate Data Transmissions

12. MOB-87 restricted LMSS use of the 1533-1544, 1626.5-1631.5, and 1634.5-1645.5 MHz bands to non-speech low-bit rate data transmissions to protect other services from harmful interference.[19] At WARC-92, the 1626.5-1631.5 MHz band was reallocated to the MSS in Regions 2 and 3 and the restriction dropped. In the *Notice* we proposed to not limit transmissions of domestic MSS operators using these bands to non-speech low bit-rate data transmissions. Most parties support our proposal. We continue to believe that sharing these bands is technically feasible and that sharing will provide licensees flexibility to provide a variety of services using various data transmission rates without causing interference. Therefore we decline to restrict these bands to non-speech low-bit rate data transmissions.

CONCLUSION

13. To meet the projected demand of MSS services we are allocating 33 megahertz at 1530-1544 and 1626.5-1645.5 MHz to the MSS on a co-primary basis with the MMSS, subject to the conditions discussed above. Additionally, we propose to allocate 5 megahertz at 1525-1530 MHz to the MSS (space-to-Earth) on a primary basis so that the uplink and downlink MSS bands have equal spectrum.

PROCEDURAL MATTERS

14. *Regulatory Flexibility Analyses.* Analyses pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, are contained in Appendix C.

15. The Further Notice of Proposed Rule Making with regard to the 1525-1530 MHz band is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.[20]

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on the Notice of Proposed Rule Making portion of this item on or before September 8, 1993, and reply comments on or before October 8, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine comments must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

17. Accordingly, IT IS ORDERED, that Part 2 of the Commission's Rules IS AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(f), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(f), 303(g), and 303(r).

18. For further information contact Tom Mooring at (202) 653-8114, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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employ to achieve immediate availability. While a licensee also can provide dedicated channels or vary channel bandwidth to meet this requirement, our intent is that the system design allow all channels under the system's control to be preempted to meet MMSS distress and safety requirements.

[16] To meet the priority and real-time preemptive access requirements, MSS licensees are encouraged to become part of the GMDSS system. The International Maritime Organization currently is discussing the criteria necessary for regional satellite systems to participate in the GMDSS.

[17] *See Report*, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991).

[18] *WARC-92 Final Acts, supra* note 4.

[19] *See* international *Radio Regulation* 726B (RR 726B).

[20] *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1992).

APPENDIX A

Final Rules

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. In column (1) of the 1525-1530 MHz band: Add maritime mobile-satellite (space-to-Earth); add land mobile-satellite (space-to-Earth) with 726B immediately following it; and add 723B, 726A, and 726D.

b. In columns (2) and (3) of the 1525-1530 MHz band: Add mobile-satellite (space-to-Earth); and add 726A and 726D.

c. In the 1530-1533 MHz band:

i. In column (3): Add 1530-1533; add space operations (space-to-Earth), maritime mobile-satellite (space-to-Earth), land mobile-satellite (space-to-Earth), Earth exploration-satellite, and fixed; add mobile with 723 immediately following it; and add 722, 726A, 726C, and 726D.

ii. In columns (1) and (2): Change land mobile-satellite (space-to-Earth) to a primary allocation; delete 726; and add 726D.

iii. In column (1): Add 723B.

iv. In column (2): Add 726C.

d. In columns (4) and (5) of the 1530-1535 MHz band:

i. The 1530-1535 MHz band is mistakenly divided into the 1530-1533 MHz and 1533-1535 MHz bands in columns (4) and (5) of the 1530-1535 MHz band. To correct the error in columns (4) and (5): Delete 722, 726A, US78, and US272 from the 1530-1533 MHz band; and remove the 1533 MHz line.

ii. Add mobile-satellite (space-to-Earth); delete US272; and add US315.

e. In column (6) of the 1530-1535 MHz band: Change "AVIATION (87)" to "Aviation (87)" and place it below the satellite communication rule part.

f. In the 1533-1535 MHz band:

i. In column (3): Add 1533-1535 MHz; add space operation (space-to-Earth), maritime mobile-satellite (space-to-Earth), Earth exploration-satellite, and fixed; add mobile with 723 immediately following it; add land mobile-satellite (space-to-Earth) with 726B immediately following it; move 726B in one space; and add 722, 726A, 726C, and 726D.

ii. In columns (1) and (2): Delete 726; and add 726D.

iii. In column (1): Add 723B.

iv. In column (2): Add 726C.

g. In the 1535-1544 MHz band:

i. In columns (2) and (3): Add 1535-1544.

ii. In columns (1) and (3): Add maritime mobile-satellite (space-to-Earth); add land mobile-satellite (space-to-earth) with 726B immediately following it; and add 722, 726A, 726C, 726D, and 727.

iii. In column (2): Add 726C and 726D.

iv. In columns (4) and (5): Add mobile-satellite (space-to-Earth); and add US315.

h. In the 1544-1545 MHz band:

i. In columns (2) and (3): Add 1544-1545.

ii. In columns (1) and (3): Add mobile-satellite (space-to-Earth), and add 722, 726D, 727, and 727A.

iii. In column (2): Add 726D.

i. In the 1545-1555 MHz band:

i. In columns (2) and (3): Add 1545-1555.

ii. In columns (1) and (3): Add aeronautical mobile-satellite (R) (space-to-Earth); and add 722, 726A, 726D, 727, 729, 729A, and 730.

iii. In column (2): (space-to-Earth) should follow immediately behind (R); and add 726D.

j. In the 1555-1559 MHz band:

i. In column (1): Move 1555-1559 up to its correct position.

ii. In columns (2) and (3): Add 1555-1559.

iii. In columns (1) and (3): Add land mobile-satellite (space-to-Earth); and add 722, 726A, 726D, 727, 730, 730A, 730B, and 730C.

iv. In column (2): Move land mobile-satellite up to its correct position; remove the hyphen between land and mobile; place a hyphen between mobile and satellite; and add 726D, 730A, 730B, and 730C.

k. In the 1626.5-1631.5 MHz band:

i. In columns (2) and (3): Add 1626.5-1631.5 MHz.

ii. In column (1): Add maritime mobile-satellite (Earth-to-space); add land mobile-satellite (Earth-to-space) with 726B immediately following it; and add 722, 726A, 726D, 727, and 730.

iii. In column (2): Delete maritime mobile-satellite (Earth-to-space) and land mobile-satellite (Earth-to-space); add mobile-satellite (Earth-to-space); and add 726C and 726D.

iv. In column (3): Add mobile-satellite (Earth-to-space); and add 722, 726A, 726C, 726D, 727, and 730.

l. There are two extra horizontal lines that are to be removed in columns (4), (5), and (6) of the 1626.5-1645.5 MHz band:

i. Before correcting the error, delete 722 and 726A in the mislabeled 1626.5-1645.5 MHz band in columns (4) and (5).

ii. Remove the 1631.5 MHz line in columns (4), (5), and (6).

iii. Remove the 1634.5 MHz line in columns (4), (5), and (6).

m. In columns (4) and (5) of the corrected 1626.5-1645.5 MHz band: Add mobile-satellite (Earth-to-space); and add 722, 726A, and US315.

n. In the 1631.5-1634.5 MHz band:

i. In columns (2) and (3): Add 1631.5-1634.5.

ii. In columns (1) and (3): Add maritime mobile-satellite (Earth-to-space) and land mobile-satellite (Earth-to-space); and add 722, 726A, 726C, 726D, 727, 730, and 734A.

iii. In column (2): Add 726C and 726D.

o. In the 1634.5-1645.5 MHz band:

i. In column (1): 1634.5-1645.5 is mislabeled as 1534.5-1645.5; correct the error.

ii. In columns (2) and (3): Add 1634.5-1645.5.

iii. In columns (1) and (3): Add maritime mobile-satellite (Earth-to-space) and land mobile-satellite (Earth-to-space); and add 722, 726A, 726C, 726D, 727, and 730.

iv. In column (2): Change land mobile-satellite (Earth-to-space) to a secondary allocation and add 726B immediately following it; and add 726C and 726D.

p. In the 1645.5-1646.5 MHz band:

i. In columns (2) and (3): Add 1645.5-1646.5.

ii. In columns (1) and (3): Add mobile-satellite (Earth-to-space); and add 722, 726D, and 734B.

iii. In column (2): Add 726D.

q. In the 1646.5-1656.5 MHz band:

i. Add the 1656.5 MHz horizontal line in columns (1), (2), and (3).

ii. In columns (2) and (3): Add 1646.5-1656.5.

iii. In columns (1) and (3): Add aeronautical mobile-satellite (R) (Earth-to-space); and add 722, 726A, 726D, 727, and 729A.

iv. In column (1): Add 730 and 735.

v. In column (2): Add 726D.

r. In the 1656.5-1660 MHz band:

i. In columns (2) and (3): Add 1656.5-1660.

ii. In columns (1) and (3): Add land mobile-satellite (Earth-to-space); and add 722, 726A, 726D, 727, 730, 730A, 730B, 730C, and 734A.

iii. In column (2): Add 726D, 730B, and 730C.

s. In the 1660-1660.5 MHz band:

i. In columns (2) and (3): Add 1660-1660.5.

ii. In columns (1) and (3): Add radio astronomy and land mobile-satellite (Earth-to-space); and add 722, 726A, 726D, 730A, 730B, 730C, and 736.

iii. In column (2): Change land mobile-satellite (Earth-to-space) to a primary allocation; and add 726D, 730B, and 730C.

§ 2.106 Table of Frequency Allocations.

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International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
			1435-1530 MOBILE (aeronautical telemetering).	1435-1530 MOBILE (aeronautical telemetering).	AVIATION (87).	
1525-1530 SPACE OPERATION (space-to-Earth). FIXED. MARITIME MOBILE-SATELLITE (space-to-Earth). Land Mobile-Satellite (space-to-Earth) 726B. Earth Exploration-Satellite. Mobile except aeronautical mobile 724. 722 723B 725 726A 726D	1525-1530 SPACE OPERATION (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. 722 723A 726A 726D	1525-1530 SPACE OPERATION (space-to-Earth). FIXED. MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Mobile 723 724. 722 726A 726D	722 US78	722 US78		
1530-1533 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). LAND MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile except aeronautical mobile. 722 723B 726A 726D	1530-1533 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). LAND MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. 722 726A 726C 726D	1530-1533 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). LAND MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. 722 726A 726C 726D	1530-1535 MARITIME MOBILE-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). Mobile (aeronautical telemetering).	1530-1535 MARITIME MOBILE-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). Mobile (aeronautical telemetering).	SATELLITE COMMUNICATION (25). Aviation (87).	

1533-1535 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile except aeronautical mobile. Land Mobile-Satellite (space-to-Earth) 726B. 722 723B 726A 726D	1533-1535 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. Land Mobile-Satellite (space-to-Earth) 726B. 722 726A 726C 726D	1533-1535 SPACE OPERATION (space-to-Earth). MARITIME MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. Land Mobile-Satellite (space-to-Earth) 726B. 722 726A 726C 726D	722 726A US78 US315	722 726A US78 US315		
1535-1544 MARITIME MOBILE-SATELLITE (space-to-Earth). Land Mobile-Satellite (space-to-Earth) 726B. 722 726A 726C 726D 727	1535-1544 MARITIME MOBILE-SATELLITE (space-to-Earth). Land Mobile-Satellite (space-to-Earth) 726B. 722 726A 726C 726D 727	1535-1544 MARITIME MOBILE-SATELLITE (space-to-Earth). Land Mobile-Satellite (space-to-Earth) 726B. 722 726A 726C 726D 727	1535-1544 MARITIME MOBILE-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 722 726A US315	1535-1544 MARITIME MOBILE-SATELLITE (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). 722 726A US315	MARITIME (80). SATELLITE COMMUNICATIONS (25).	
1544-1545 MOBILE-SATELLITE (space-to-Earth). 722 726D 727 727A	1544-1545 MOBILE-SATELLITE (space-to-Earth). 722 726D 727 727A	1544-1545 MOBILE-SATELLITE (space-to-Earth). 722 726D 727 727A				
1545-1555 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth). 722 726A 726D 727 729 729A 730	1545-1555 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth). 722 726A 726D 727 729 729A 730	1545-1555 AERONAUTICAL MOBILE-SATELLITE (R) (space-to-Earth). 722 726A 726D 727 729 729A 730				
1555-1559 LAND MOBILE-SATELLITE (space-to-Earth). 722 726A 726D 727 730 730A 730B 730C	1555-1559 LAND MOBILE-SATELLITE (space-to-Earth). 722 726A 726D 727 730 730A 730B 730C	1555-1559 LAND MOBILE-SATELLITE (space-to-Earth). 722 726A 726D 727 730 730A 730B 730C				

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1626.5-1631.5 MARITIME MOBILE-SATELLITE (Earth-to-space). Land Mobile-Satellite (Earth-to-space) 726B. 722 726A 726D 727 730	1626.5-1631.5 MOBILE-SATELLITE (Earth-to-space). 722 726A 726C 726D 727 730	1626.5-1631.5 MOBILE-SATELLITE (Earth-to-space). 722 726A 726C 726D 727 730	1626.5-1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 722 726A US315	1626.5-1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 722 726A US315	MARITIME (80). SATELLITE COMMUNICATION (25).	
1631.5-1634.5 MARITIME MOBILE-SATELLITE (Earth-to-space). LAND MOBILE-SATELLITE (Earth-to-space). 722 726A 726C 726D 727 730 734A	1631.5-1634.5 MARITIME MOBILE-SATELLITE (Earth-to-space). LAND MOBILE-SATELLITE (Earth-to-space). 722 726A 726C 726D 727 730 734A	1631.5-1634.5 MARITIME MOBILE-SATELLITE (Earth-to-space). LAND MOBILE-SATELLITE (Earth-to-space). 722 726A 726C 726D 727 730 734A				
1634.5-1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space). Land Mobile-Satellite (Earth-to-space) 726B. 722 726A 726C 726D 727 730	1634.5-1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space). Land Mobile-Satellite (Earth-to-space) 726B. 722 726A 726C 726D 727 730	1634.5-1645.5 MARITIME MOBILE-SATELLITE (Earth-to-space). Land Mobile-Satellite (Earth-to-space) 726B. 722 726A 726C 726D 727 730				
1645.5-1646.5 MOBILE-SATELLITE (Earth-to-space). 722 726D 734B	1645.5-1646.5 MOBILE-SATELLITE (Earth-to-space). 722 726D 734B	1645.5-1646.5 MOBILE-SATELLITE (Earth-to-space). 722 726D 734B				
1646.5-1656.5 AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space). 722 726A 726D 727 729A 730 735	1646.5-1656.5 AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space). 722 726A 726D 727 729A 730 735	1646.5-1656.5 AERONAUTICAL MOBILE-SATELLITE (R) (Earth-to-space). 722 726A 726D 727 729A 730 735				

1656.5-1660 LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 727 730 730A 730B 730C 734A	1656.5-1660 LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 727 730 730A 730B 730C 734A	1656.5-1660 LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 727 730 730A 730B 730C 734A
1660-1660.5 RADIO ASTRONOMY LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 730A 730B 730C 736	1660-1660.5 RADIO ASTRONOMY LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 730A 730B 730C 736	1660-1660.5 RADIO ASTRONOMY LAND MOBILE- SATELLITE (Earth- to-space). 722 726A 726D 730A 730B 730C 736

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t. Add 723B, 726C, 726D, 730B, and 730C to and delete 726 from the International Footnotes described in Section 2.106. Additionally, modify footnotes 724, 726A, and 726B. Finally, add US315 to the list of United States Footnotes.

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INTERNATIONAL FOOTNOTES

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723B Additional allocation: in Belarus, the Russian Federation and Ukraine, the band 1429-1535 MHz is also allocated to the aeronautical mobile service on a primary basis exclusively for the purposes of aeronautical telemetry within the national territory. As of 1 April 2007, the use of the band 1452-1492 MHz is subject to agreement between the administrations concerned.

* * *

724 Different category of service: in Afghanistan, Saudi Arabia, Bahrain, Bulgaria, Cameroon, Egypt, the United Arab Emirates, France, Iran, Iraq, Israel, Kuwait, the Lebanon, Morocco, Mongolia, Oman, Poland, Qatar, Syria, the German Democratic Republic, Romania, Czechoslovakia, the U.S.S.R., Yemen and Yugoslavia, the allocation of the band 1525-1530 MHz to the mobile, except aeronautical mobile, service is on a primary basis (see No. 425).

* * *

726A The bands 1525-1544 MHz, 1545-1559 MHz, 1626.5-1645.5 MHz and 1646.5-1660.5 MHz shall not be used for feeder links of any service. In exceptional circumstances, however, an earth station at a specified fixed point in any of the mobile-satellite services may be authorized by an administration to communicate via space stations using these bands.

726B The use of the bands 1525-1530 MHz, 1533-1544 MHz, 1626.5-1631.5 MHz and 1634.5-1645.5 MHz by the land mobile-satellite service is limited to non-speech low bit-rate data transmissions.

726C Additional allocation: in Argentina, Australia, Brazil, Canada, the United States, Malaysia and Mexico, the band 1530-1544 MHz is allocated to the mobile-satellite (space-to-Earth) service, and the band 1626.5-1645.5 MHz is also allocated to the mobile-satellite (Earth-to-space) service, on a primary basis subject to the following conditions: maritime mobile-satellite distress and safety communications shall have priority access and immediate availability over all other mobile-satellite communications operating under this provision. Communications of mobile-satellite system stations not participating in the global maritime distress and safety system (GMDSS) shall operate on secondary basis to distress and safety communications of stations operating in the GMDSS. Account shall be taken of the priority of safety-related communications in the other mobile-satellite services.

726D The use of the bands 1525-1559 and 1626.5-1660.5 MHz by the mobile-satellite services are subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). In Regions 1 and 3 in the band 1525-1530 MHz coordination of space stations of the mobile-satellite services with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in the band 1525-1530 MHz, the provisions of Section II, paragraph 2.2 of Resolution 46 (WARC-92) shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

* * *

730B Alternative allocation: in Australia, Canada and Mexico, the band 1555-1559 MHz is allocated to the mobile-satellite (space-to-Earth) service, the band 1656.5-1660 MHz is allocated to the mobile-satellite (Earth-to-space) service, and the band 1660-1660.5 MHz is allocated to the mobile-satellite (Earth-to-space) and the radio astronomy services, on a primary basis.

730C Alternative allocation: in Argentina and the United States, the band 1555-1559 MHz is allocated to the mobile-satellite (space-to-Earth) service, the band 1656.5-1660 MHz is allocated to the mobile-satellite (Earth-to-space) service, and the band 1660-1660.5 MHz is allocated to the mobile-satellite (Earth-to-space) and radio astronomy services, on a primary basis subject to the following conditions: the aeronautical mobile-satellite (R) service shall have priority access and immediate availability over all other mobile-satellite communications within a network operating under this provision; mobile-satellite systems shall be interoperable with the aeronautical mobile-satellite (R) service; account shall be taken of the priority of safety-related communications in the other mobile-satellite services.

* * *

UNITED STATES (U.S.) FOOTNOTES

* * *

US315 In the frequency bands 1530-1544 MHz and 1626.5-1645.5 MHz maritime mobile-satellite distress and safety communications, *e.g.*, GMDSS, shall have priority access with real-time preemptive capability in the mobile-satellite service. Communications of mobile-satellite system stations not participating in the GMDSS shall operate on a secondary basis to distress and safety communications of stations operating in the GMDSS. Account shall be taken of the priority of safety-related communications in the mobile-satellite service.

APPENDIX B

Proposed Rules

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is proposed to be amended as follows:

a. In columns (4), (5), and (6): Divide the 1435-1530 MHz band into two bands, the 1435-1525 MHz band and the 1525-1530 MHz band.

b. The new 1435-1525 MHz band will contain the same allocation and footnotes as the 1435-1530 MHz band originally had.

i. In columns (4) and (5) of the new 1435-1525 MHz band: Retain mobile (aeronautical telemetering); and retain 722 and US78.

ii. In column (6): Retain "AVIATION (87)."

c. In the new 1525-1530 MHz band:

i. In columns (4) and (5): Add mobile-satellite (space-to-Earth); add mobile (aeronautical telemetering) as a secondary allocation; and add 726A.

ii. In column (6), add "SATELLITE COMMUNICATION (25)." and "Aviation (87)."

§ 2.106 Table of Frequency Allocations.

* * * * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
			1435-1525 MOBILE (aeronautical telemetering). 722 US78	1435-1525 MOBILE (aeronautical telemetering). 722 US78	AVIATION (87).	
1525-1530 SPACE OPERATION (space-to-Earth). FIXED. MARITIME MOBILE-SATELLITE (space-to-Earth). Land Mobile-Satellite (space-to-Earth) 726B. Earth Exploration-Satellite. Mobile except aeronautical mobile 724. 722 723B 725 726A 726D	1525-1530 SPACE OPERATION (space-to-Earth). MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Fixed. Mobile 723. 722 723A 726A 726D	1525-1530 SPACE OPERATION (space-to-Earth). FIXED. MOBILE-SATELLITE (space-to-Earth). Earth Exploration-Satellite. Mobile 723 724. 722 726A 726D	1525-1530 MOBILE-SATELLITE (space-to-Earth). Mobile (aeronautical telemetering). 722 726A US78	1525-1530 MOBILE-SATELLITE (space-to-Earth). Mobile (aeronautical telemetering). 722 726A US78	SATELLITE COMMUNICATION (25). Aviation (87).	
*	*	*	*	*	*	*

II. Part 87 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 87 - AVIATION SERVICES

1. The authority citation in Part 87 continues to read:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 310-609.

2. Section 87.187(o) is proposed to be amended as follows:

Subpart F - Aircraft Stations

* * *

§ 87.187 Frequencies.

* * *

(o) The frequency band 1435-1525 MHz is available on a primary basis and the frequency band 1525-1535 MHz is available on a secondary basis for telemetering and telecommand associated with the flight testing of aircraft, missiles, or related major components. This includes launching into space, reentry into the earth's atmosphere and incidental orbiting prior to reentry. The following frequencies are shared with flight telemetering mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. See § 87.303(d).

* * *

3. Section 87.303(d)(1) is proposed to be amended as follows:

Subpart J - Flight Test Stations

* * *

§ 87.303 Frequencies.

* * *

(d)(1) Frequencies in the bands 1435-1525 and 2310-2390 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of manned or unmanned aircraft and missiles, or their major components. The 1525-1535 MHz band is allocated for the above purposes on a secondary basis. Permissible uses include telemetering and telecommand transmissions associated with the launching and reentry into the earth's atmosphere as well as any incidental orbiting prior to reentry of manned or unmanned objects undergoing flight tests. In the 1435-1530 MHz band, the following frequencies are shared with flight telemetering mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. In the 2310-2390 MHz band, the following frequencies may be assigned on a co-equal basis for telemetering and associated telecommand operations in fully operational expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2312.5, 2332.5, 2352.5, 2364.5, 2370.5 and 2382.5 MHz. In the 2310-2390 MHz band, all other telemetry and telecommand uses are secondary.

* * *

(d)(2) The authorized bandwidths for stations operating in the bands 1435.000-1535.000 and 2310.000-2390.000 MHz are normally 1, 3 or 5 MHz. Applications for greater bandwidths will be considered in accordance with the provisions of § 87.135. Each assignment will be centered on a frequency between 1435.500 and 1534.500 and 2310.500 and 2389.500 MHz, with 1 MHz channel spacing. Assignments in the 1525-1535 MHz band will be on a secondary basis.

* * *

APPENDIX C

Regulatory Flexibility Analyses

FIRST REPORT AND ORDER
FINAL REGULATORY FLEXIBILITY ANALYSIS

1. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in GEN Docket No. 90-56. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

A. *Need for and Objective of Rules:* This allocation is needed to meet demonstrated demand for mobile-satellite services. Our objective is to provide spectrum to meet this demand by allocating spectrum that will be shared between land mobile-satellite services, maritime mobile-satellite services, and aeronautical mobile-satellite services in the 1530-1544 and 1626.5-1645.5 MHz bands. We believe that sharing among the services in these bands is feasible and will serve the public interest. We also are adopting requirements to ensure that important maritime safety-related communications needs are fully met and protected.

B. *Issues Raised by the Public in Response to the Initial Analysis:* No party suggested specific modifications to the initial regulatory flexibility analysis.

C. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives:* In the *Notice of Proposed Rule Making*, we proposed a spectrum allocation that we believed would address the demonstrated demand for MSS services and yet reduce administrative burdens to the public as much as possible. Based on the record, we conclude that the spectrum allocation being adopted in this proceeding is in the public interest and also minimizes the impact to small business entities. The Secretary shall send a copy of this *Report and Order and*

Further Notice of Proposed Rule Making to the Chief Counsel for Advocacy of the Small Business Administration.

FURTHER NOTICE OF PROPOSED RULE MAKING REGULATORY FLEXIBILITY ANALYSIS

2. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. *Reason For Action:* This rule making proceeding is initiated to obtain comment regarding the proposed allocation of an additional 5 megahertz of spectrum to the MSS.

B. *Objective:* The objective of this proposal is to provide the additional spectrum needed to balance the space-to-Earth segment with the Earth-to-space segment.

C. *Legal Basis:* The proposed action is authorized by Sections 4(i), 7(a), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(f), 303(g), and 303(r).

D. *Description, Potential Impact, and Number of Small Entities Affected:* This proposal may provide new opportunities for radio manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment. We are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. *Reporting, Record Keeping, and Other Compliance Requirements:* None.

F. *Federal Rules That Overlap, Duplicate, or Conflict With This Rule:* None.

G. *Significant Alternatives:* None.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of

KAREN M. LOWERY	File No. BPH-890914MU
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For a Construction Permit for a
New FM Station on Channel 284A at
White City, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1993; Released: June 25, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member BLUMENTHAL:

1. The Review Board has under consideration a joint request for approval of settlement agreements filed by the above-captioned applicants on April 16, 1993,[1] and supplemented on April 23, 27, 30, and May 11, 1993; a petition for leave to amend filed by Midway Broadcasting Company (Midway) on April 16, 1993; and consolidated comments submitted by the Mass Media Bureau (Bureau) on April 29, 1993 in support of these filings.

2. In an *Initial Decision* (*I.D.*), 7 FCC Rcd 3286 (1992), Administrative Law Judge Walter C. Miller (ALJ) granted the application of Crystal Communications, Inc. (Crystal) for authority to construct a new FM station at White City, Florida, based on the strength of its comparative proposal featuring the full-time integration of its 100% voting stockholder, Barbara Marshall, an experienced broadcaster and local resident, into the management of the proposed station.[2] Following oral argument on exceptions to that decision,[3] the remaining parties advised the Board that they had reached a settlement of the proceeding. The agreements they have submitted contemplate grant of Midway's application, as amended, and dismissal of the mutually exclusive applications of Karen M. Lowery, Crystal, White City Broadcasting, Inc. (WCBI), and Heather Willson Cass, in return for the partial reimbursement of their legitimate and prudent expenses. In addition, Crystal principal Barbara Marshall is to receive a 5% equity interest in Midway and a position of full-time employment at the proposed station as general manager.

3. Under the specific terms of the buy-out agreements, Midway will pay Lowery the sum of $30,000, WCBI $40,000, and Cass $110,000, in return for the voluntary dismissal of their applications. Lowery, WCBI, and Cass have each submitted declarations of their principals and accompanying documentation demonstrating compliance with the requirements of Section 73.3525 of the Commission's rules, 47 CFR §73.3525, including showings that the amounts do not exceed the dismissing applicants' legitimate and prudent out-of-pocket expenses; their applications were not filed for improper purpose; no additional consideration has been promised or paid; and approval of the settlement agreements would serve the public interest. *See generally Settlement Agreements*, 6 FCC Rcd 85, *modified*, 6 FCC Rcd 2601 (1991). The Bureau supports the grant of the joint request with respect to these agreements.[4]

4. With respect to the merger agreement between Midway and Crystal, Crystal will receive in consideration for the voluntary dismissal of its winning application: (1) monetary consideration of $122,000; (2) a 5% carried non-voting stock interest in Midway to Barbara Marshall; and (3) Midway's execution of an employment agreement providing that Marshall will be employed on a full-time basis as the White City station's general manager for a term of three years. Under the terms of the employment agreement, Marshall will terminate her current employment, a management position with a broadcast station group owner, and will receive $2,000 per month during station construction and a base annual salary of $45,000 once operations commence, supplemented by an annual cost of living increase and a performance bonus based on station profits. The agreement includes a non-compete provision and provides that Marshall may be terminated for cause. On behalf of Crystal, Marshall states in an accompanying declaration that the monetary

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[1] In accordance with the joint movants' request, the Board has deferred action on the settlement requests for a 60-day period to ensure adequate time for the escrow of funds required under the agreements' provisions. Joint Request at 1.

[2] *Initial Decision*, 7 FCC Rcd 3286, 3295-96, 3302 (ALJ 1992). Crystal's proposal is further enhanced by Marshall's background of civic involvement within the service area and her status as a minority. *Id.* at ¶ ¶ 134-37.

[3] Former applicants William F. Peel, Jr., Minority Broadcasting Group Limited, and Sea Oaks Broadcasting, who did not file exceptions to the *Initial Decision*, were dismissed from the proceeding pursuant to 47 CFR § 1.276(f). *William F. Peel, Jr.*, 7 FCC Rcd 6057 (Rev. Bd. 1992).

[4] Bureau Comments at 3. The Bureau expressed reservations only with respect to WCBI's inclusion of undocumented accounting fees in its itemization of out-of-pocket expenses. *Id.* at 2 n.1. In response to this concern, WCBI submitted in a May 11, 1993 supplement to the joint request a declaration from its accountant documenting that expenditure. The Bureau has since informally notified the Board of its support of WCBI's settlement agreement with Midway.

consideration does not exceed that applicant's legitimate and prudent out-of pocket expenses of $143,531.45, and that the application and agreement otherwise complies with § 73.3525(a). Crystal submitted as a supplement to the joint request on April 27, 1993, the declaration of its counsel confirming the expenditure of in excess of $125,431.45 in legal fees.

5. Midway simultaneously seeks to amend its application and integration proposal to include Marshall's participation as a 5% non-voting stockholder and her role as the proposed station's general manager. The amendment further reflects that Midway voting stockholder Alice E. Lee, originally proposed to serve as Midway's full-time general manager, will serve instead as the station's business manager on a part-time basis.[5] Lee will continue to serve as Midway's president, secretary, treasurer, and director.

6. The Bureau supports the approval of the Midway/Crystal agreement. It finds that the proposed merger between Midway and Crystal's voting shareholder is a *bona fide* business arrangement reflecting an appropriate allocation of risks and rewards between Midway and Marshall.[6] It further supports grant of Midway's amendment including the modification of the Lee integration proposal. The Bureau notes that although the Commission generally requires that successful applicants to post-discovery settlement agreements fulfill their integration proposals, it recognizes that some flexibility is necessary where applicants proposing equivalent integration proposals merge their applications.[7] It concludes that the parties here have reached "a reasonable compromise" between their identical integration proposals whereby Marshall will serve as the station's full-time general manager and Lee will serve as its business manager on a part-time basis.

7. *Discussion.* We largely agree with the Bureau's analysis and conclude that approval of the above-described settlement agreements and implementing amendment will serve the public interest without detriment to the Commission's comparative hearing reforms. We concur that the merger of Midway and Crystal is *bona fide*, as contemplated by *Settlement Agreements*, 6 FCC Rcd 2901, 2902 (1991), and not filed to evade the Commission's payment restrictions for non-merger settlements.[8] With respect to the modification of Midway's integration proposal, the Bureau accurately observes that the agency has taken a "flexible approach" where merging entities have proposed, at least, equivalent integration "modifications." *See, e.g., WCVQ, Inc.*, FCC 92I-087, released November 17, 1992, (Office of General Counsel (OGC), by delegated authority, approved a merger of the five remaining parties to that proceeding and permitted abandonment of several integration proposals), citing *Kevin Potter*, FCC 92I-065, released July 20, 1992 (where OGC earlier approved a merger agreement and integration proposal abandonment by *both* applicants). As we recently noted in *Gifford Orion Broadcasting, Ltd.*, FCC 93R-18, at 3 n.18, released May 29, 1993 (application for review pending), the Commission's new policies on integration pledge abandonment are still "evolving,"[9] some of it under delegated authority.[10]

8. Here, and unlike, *e.g., Kevin Potter*, whereas both merging entities respectively proposed their principals to serve as the station's full-time general manager, one instant integration proposal will merely be modified to accommodate the other. Hence, in the face of precedent, we do not find that *Comparative Hearing Reform* would be frustrated by the modification of Midway's integration proposal, because Crystal's integration proposal (which was the key factor in the *I.D.'s* award of the construction permit below) will be largely fulfilled; and Midway's proposal, which received no credit below, actually is to be performed *in part* under this agreement.

9. ACCORDINGLY, IT IS ORDERED, That the exceptions, contingent exceptions, and appeal filed by Karen M. Lowery, Crystal Communications, Inc., White City Broadcasting, Inc., Heather Willson Cass, and Midway Broadcasting Company on July 10, 1992, ARE DISMISSED; that the motion for leave to exceed page limitations filed by Karen M. Lowery on July 10, 1992, IS DISMISSED as moot; and that the petitions for leave to amend filed by White City Broadcasting, Inc. on June 29, 1992, and by Midwest Broadcasting Company on February 25, 1993, and April 16, 1993, ARE GRANTED, and the corresponding amendments ARE ACCEPTED; and

10. IT IS FURTHER ORDERED, That the joint request for approval of settlement agreement filed by Karen M. Lowery, Crystal Communications, Inc., White City Broadcasting, Inc., Heather Willson Cass, and Midway Broadcasting Company on April 16, 1993, as supplemented by Lowery on April 23, 1993, by Crystal on April 27, 1993,

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[5] Although Midway proposed that Lee would be integrated into the management of its proposed station as full-time general manager, the ALJ concluded that Midway's proposal lacked reliability and he declined to credit Lee's integration. *I.D.*, ¶ ¶ 168-69, 201.

[6] Bureau Comments at 3-4, citing *Settlement Agreements*, 6 FCC Rcd 2901, 2902 (1991); *Venton Corp.*, 90 FCC 2d 307 (1982).

[7] Bureau Comments at 4, citing *Comparative Hearing Reform*, 6 FCC Rcd 157, 160 (1990), *clarified*, 6 FCC Rcd 3403 (1991); *WCVQ, Inc.*, FCC 91I-087, released Nov. 17, 1992.

[8] *See Ronald Sorenson*, FCC 93I-04, released Jan.25, 1993 (OGC approves merger agreement); *Harrison County Broadcasting Co.*, FCC 92I-072, released Sept. 8, 1992 (same). Although merging applicants are exempted from the payment restrictions of 47 CFR §73.3525(a)(3), Crystal has demonstrated that the payment from Midway does not exceed its legitimate expenses.

[9] *Compare Richard Bott II*, FCC 93-290, released June 10, 1993 (Commission designates for hearing application to assign unbuilt construction permit, received as a result of a comparative hearing, where assignor will abandon integration proposal).

[10] In rejecting the settlement as proposed in the recent *Gifford* proceeding, we ultimately responded positively to the staunch opposition to that settlement by the Commission's Mass Media Bureau, which has much experience under the Commission's newer settlement policies, even going so far as to midwife quite a few. At the same time, the Board was compelled to admit to "some apparent unevenness by the bureaucracy in the administration of the Commission's freshly revamped settlement policies," and we expressed concern that the settling parties in that case might colorably argue that they were being treated dissimilarly from certain applicants in prior cases. *See Gifford, supra*, at ¶ ¶ 9-10. Indeed, we there took the extraordinary step of all but inviting full Commission review of this uneven evolution, on its own motion. *See id.* at ¶ 10, citing 47 CFR § 1.117. Our present case, however, is readily distinguishable from *Gifford*, for the reasons discussed in our text and propounded here by the Bureau.

by Midway on April 30, 1993, and by WCBI on May 11, 1993, IS GRANTED, and the accompanying settlement agreements ARE APPROVED; and

11. IT IS FURTHER ORDERED, That the applications of Karen M. Lowery (File No. BPH-890914MU), Crystal Communications, Inc. (File No. BPH-890914NF), White City Broadcasting, Inc. (File No. BPH-890914NP), and Heather Willson Cass (File No. BPH-890914NW) ARE DISMISSED; that the application of Midway Broadcasting Company (File (No. BPH-890914OD) IS GRANTED subject to the outcome of MM Docket No. 88-366;[11] and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[11] *See Hearing Designation Order*, 6 FCC Rcd 2501, 2503 ¶ 12 (Mass Med. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 16, 1993

AMERITECH OPERATING COMPANIES, BELLSOUTH TELECOMMUNICATIONS, INC., AND SOUTHWESTERN BELL TELEPHONE COMPANY PETITIONS FOR WAIVER OF PART 69 ACCESS RULES

Pleading Cycle Established

COMMENTS: June 28, 1993
REPLY COMMENTS: July 6, 1993

In connection with the establishment of Telecommunications Relay Service (TRS), the companies named in the caption have petitioned for waiver of Part 69 of the Commission's Rules, as described below. These companies also filed tariffs to provide TRS on June 11, 1993.

The several petitions seek waiver of Part 69 of the Commission's Rules in order to establish an alternative switched access service, dedicated to implementation of TRS, that these companies assert will enhance the technical efficiency and billing procedures of that service. The petitioners generally state that interexchange carriers have sought this alternative form of access to connect the TRS provider with a serving wire center, and the wire center to the exchange carrier's access tandem providing TRS, as well as the terminations at each end of this arrangement. Under these alternatives, some functions normally provided by the local exchange carrier will be provided by the TRS provider to enable proper call routing both by the exchange carrier and the interexchange carrier selected by a TRS subscriber.

Interested parties may file comments regarding the Ameritech, BellSouth, and Southwestern Bell petitions no later than **June 28, 1993,** the same date petitions to reject, suspend or investigate the TRS tariffs are due. These comments may be included in petitions regarding these tariffs, but should be discussed in a separate section of the petitions. Reply comments on the waiver petitions, which may be included in the filing carriers' replies to petitions against these tariffs, may be filed no later than **July 6, 1993.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules. 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Stan Wiggins, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-577

In re Applications of

LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	File No. BPH-870831ML
ORION COMMUNICATIONS LIMITED	File No. BPH-870831ME

For a Construction Permit
For a New FM Station in
Biltmore Forest, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1993; Released: June 25, 1993

By the Commission:

1. In *Liberty Productions, Inc.*, 7 FCC Rcd 7581 (1992), we denied four petitions for reconsideration of our earlier decision, *National Communications Industries*, 7 FCC Rcd 1703 (1992), that affirmed the Review Board's disqualification of Liberty Productions and Biltmore Forest Broadcasting FM (BFBFM) on site issues and its selection of Orion as the comparative winner. We also denied Willsyr's motions seeking the addition of financial, lack of candor, misrepresentation, and reporting issues against Orion. In doing so, we found that Willsyr had not exercised due diligence, raised a question of probable decisional significance, or shown such a substantial likelihood of proving its claims that Orion is not financially qualified as to warrant further inquiry. 7 FCC Rcd at 7585 ¶ 28.

2. Additional petitions for reconsideration have been filed by Liberty, Willsyr, and Skyland.[1] In its petition for reconsideration, Liberty urges that the proposed position of Orion's 30% owner, Betty Lee, is not sufficiently managerial to merit any integration credit. Willsyr and Skyland seek reconsideration of the Commission's refusal to add financial, reporting, and misrepresentation issues against Orion. They fault the Commission for concluding, based upon unsworn bank letters submitted by Orion and upon the undocumented claim of Orion principal Zebulon Lee that he had substantially paid tax liens against him (and against his existing station WSKY(AM)), that the liens did not jeopardize the availability of its $300,000 loan commitment, and that the original bank letter, as clarified by the bank, was not a mere accommodation.[2]

3. The petitions for reconsideration are procedurally deficient. A repetitious petition for reconsideration is expressly prohibited by the rules and may be dismissed. 47 C.F.R § 1.106(k)(3); *United Broadcasting Company of Florida*, 39 RR 2d 448 (1976). Liberty seeks reconsideration of our order denying its petition for reconsideration. While couched as petitions for reconsideration of the Commission's denial of Willsyr's motions to enlarge issues, Willsyr's and Skyland's petitions for reconsideration are likewise repetitious in that they object, as they did in their initial petitions for reconsideration, to the grant of Orion's application for the Biltmore Forest station.

4. Pursuant to § 1.106(k)(3), we will dismiss the petitions for reconsideration. We will, however, out of an abundance of caution, address briefly certain matters discussed therein. We find, for the reasons set forth below, that the petitions for reconsideration are deficient in that they do not rely on new facts or changed circumstances that could not have been reasonably discovered before its last opportunity to present such matters to the Commission, as required by 47 C.F.R. § 1.106(b)(2).[3]

5. In their petitions for reconsideration, Skyland and Willsyr have again failed to raise a substantial and material question warranting further inquiry. They fault our

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[1] The following pleadings are pending before the Commission: (a) Petitions for Reconsideration, filed December 23, 1992, by Willsyr Communications Limited Partnership, Liberty Productions, and Skyland Broadcasting Company; (b) Consolidated Opposition to Petitions for Reconsideration, filed January 7, 1993, by Orion; (c) Replies to Opposition, filed on January 15, 1993 by Willsyr, on January 19, 1993 by Skyland, and on January 21, 1993, by Liberty; (d) Motion to Strike Consolidated Opposition, filed January 15, 1993, by Willsyr; (e) Opposition to Motion to Strike, filed January 21, 1993, by Orion; (f) Motion to Strike Opposition, filed February 1, 1993, by Willsyr; and (g) Opposition to Motion to Strike, filed February 5, 1993, by Orion. In view of our action herein dismissing on procedural grounds the petitions for reconsideration, Orion's consolidated opposition and the related motions to strike, which assert that Orion's January 7 opposition was filed one day late and that Orion's January 21 opposition so inaccurately characterizes the Commission's rules concerning the calculation of filing dates as to exceed the bounds of permissible advocacy, are moot and may be dismissed.

[2] The fourth applicant, BFBFM, filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit.

[3] Liberty maintains that the award of comparative credit for the proposed integration of Orion's Betty Lee as Director of Public Affairs and Public Service is inconsistent with *Jones Eastern of the Outer Banks*, 7 FCC Rcd 6800 (1992), which did not list that particular position as constituting "meaningful management and staff presence" under the main studio rule. However, *Jones* did not purport to list exhaustively all such positions, let alone dictate their treatment for comparative purposes. 7 FCC Rcd at 6801-02 ¶ ¶ 9-11 & n.9. In any event, *Jones* was released before our denial of Liberty's earlier petition for reconsideration, and thus, it could have been raised earlier.

reliance on the unsworn July 1992 bank letter reaffirming the bank's willingness to make the loan despite the outstanding liens, and on Lee's undocumented claim to have substantially satisfied the tax liens. However, petitioners have cited no case in which the Commission has required sworn statements from a lending institution in order to corroborate the availability of a loan commitment. Nor have they submitted any evidence impeaching the bank's statements concerning its willingness to make the loan and its original intent with respect to the sale of WSKY,[4] or Lee's statement under penalty of perjury concerning the payment of the outstanding liens.

6. By the same token, petitioners have submitted no specific evidence supporting the claim that Orion's original bank letter, as modified by the July 1992 letter, is deficient. They repeat the earlier argument that the letter must have been a mere accommodation because it does not affirmatively indicate either a long-standing relationship between Orion and the bank or the submission of financial information from which the bank could evaluate its qualifications. We are not aware of any Commission ruling, however, that a bank letter is deficient because of its silence on these matters. Petitioners rely on cases in which a bank letter was rejected based upon either impeaching language in the letter or upon specific, affirmative evidence reflecting that a lender was not familiar with, and did not review, a borrower's financial qualifications. As set forth in our earlier decision in this case, 7 FCC Rcd at 7584 ¶ 25, the bank letter reflects sufficient dialogue between Lee and the bank to establish that it had a present, firm intention to make the proposed loan, future conditions permitting.[5] Thus, in the absence of specific evidence of the bank's unfamiliarity with (and failure to review) Orion's financial qualifications, the cases cited by petitioners do not support the addition of a financial issue against Orion.

7. Nor is there a basis for adding a reporting issue against Orion under 47 C.F.R. § 1.65 of the rules. In the decision below, 7 FCC Rcd 7584 ¶ 20, we determined that Orion did not have a section 1.65 duty to report the liens against station WSKY because the bank loan was not contingent on the sale of that station. Nonetheless, Willsyr claims that the liens against Lee were reportable because of the bank's requirement that he serve as personal guarantor on the loan.[6] Petitioner, however, has not raised a substantial and material question of fact that those liens had any impact on the availability of the bank loan.[7] Moreover, even if the liens could be construed as reportable, Willsyr has not made a *prima facie* showing of an intentional failure to report that would warrant the addition of a section 1.65 issue against Orion.[8]

8. ACCORDINGLY, IT IS ORDERED That the Petitions for Reconsideration, filed December 23, 1992, by Liberty Communications, Willsyr Communications, and Skyland Broadcasting Company ARE DISMISSED; and that the consolidated opposition, filed on January 7, 1993, by Orion Communications Limited, and the Motions to Strike, filed January 15, and February 1, 1993, by Willsyr Communications ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[4] In its July 1992 letter, the bank clarified that it never intended to require that Lee sell station WSKY in order to collaterialize the bank loan, but only that the bank would have a security interest in any such proceeds if the station were sold.

[5] *Peter Joseph Devlin & Patricia Eve Devlin*, 7 FCC Rcd 2499, 2499-2500 ¶ 5 (Rev. Bd. 1992), rev. denied, 7 FCC Rcd 6846 (1992), citing *Merrimack Valley Broadcasting*, 82 FCC 2d 166, 167 (1980).

[6] Willsyr cites *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510 ¶ 21 (1991), but that case is factually distinguishable. The loan commitment in *Las Americas* exceeded the bank's lending limit by $250,000. The applicant had disputed the need for a financial issue, asserting that it had a financial cushion of $250,000. It neglected, however, to report a $360,000 liability, an amount potentially wiping out its claimed cushion. The bank's awareness of the unreported liability (and continued willingness to make the loan despite the $360,000 liability) did not excuse the applicant from reporting it, because the liability affected the applicant's necessary personal financial resources, and thus ultimately the applicant's financial qualifications. No such circumstances have been shown here.

[7] As to the possibility of the liens impairing Lee's ability to personally guarantee the bank loan, the bank stated in its July 1, 1992 letter that it is aware of the liens (including the unpaid penalties), and that "[they] do not affect [its] willingness to lend up to $300,000 to Orion for the Biltmore Forest FM station in accordance with the terms of [its] November 1987 letter." First Union Letter, dated July 1, 1992, at 2.

[8] See *Merrimack Valley Broadcasting Inc.*, 82 FCC 2d 165 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Radio Moultrie, Inc.
Licensee of Radio Station
WMGA, Moultrie, GA

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1993; Released: June 25, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a petition filed by Radio Moultrie, Inc. (RMI) seeking reconsideration of a Memorandum Opinion and Order, *Liability of Radio Moultrie, Inc.*, 8 FCC Rcd 104 (MM Bur. 1993) (MO&O). In that MO&O, the Chief, Mass Media Bureau, imposed a $10,000 forfeiture against RMI for violations of 47 C.F.R. Section 73.3540(a) requiring prior Commission consent to transfers of control and 47 C.F.R. Section 73.3615(a) requiring the filing of annual ownership reports. A Notice of Apparent Liability (NAL) had been issued to RMI for these violations on June 17, 1992.

2. Without disputing that the violations in fact occurred, RMI asserts that the Commission failed to assess all relevant equitable factors justifying reduction or elimination of the forfeiture. We do not agree. Both the NAL and the MO&O acknowledged the minor nature of the violations and the fact that they were voluntarily disclosed. Both took these factors into consideration in setting the amount of forfeiture. RMI's petition lists considerations supporting these observations, without supplying additional, independent, mitigating circumstances.

3. As for RMI's claim that the $8,000 forfeiture for unauthorized transfers of control was disproportionate to other Commission actions, the cases that it cites, *Liability of CanXus Broadcasting Corporation (WCXU-FM)*, 7 FCC Rcd 3874 (MM Bur. 1992), and *Liability of Mountain Signals, Inc. (WETB)*, 7 FCC Rcd 3970 (MM Bur. 1992), both involved $10,000 forfeitures assessed for single unauthorized transfers of control. RMI's $8,000 forfeiture, in contrast, represents assessments for two unauthorized transfers, or $4,000 per violation, a figure well below the $20,000 base forfeiture amount established in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Hence, even assuming, as RMI argues, that the *CanXus Broadcasting* and *Mountain Signals* violations were in all respects more egregious than its own, the forfeitures in those cases were also significantly greater.

4. Turning next to RMI's assertion that the $2,000 forfeiture imposed for failure to file an annual ownership report did not reflect the actual duration of its violation, we remain unpersuaded. It is true, as RMI notes, that the NAL overstated by more than a year the duration of RMI's violation. Given that the base amount for failure to file an ownership report under our *Policy Statement, supra*, is $7,500 per day of a violation, however, we reassert the *MO&O*'s assessment that the $2,000 figure did not penalize RMI for lengthy or continuous conduct. The forfeiture actually imposed is small in comparison with the forfeiture that could have been imposed under our guidelines.

5. RMI faults the Commission for rejecting its claim of financial hardship on the grounds that it had failed to submit a profit and loss statement prepared under generally accepted accounting principles, as specified in paragraph I.B. of the Attachment to the NAL. RMI points in this regard to the statement of its certified public accountants, included with its response to the NAL, that the attached balance sheet and related statements of income and financial position for the twelve months then ended had been compiled "in accordance with standards established by the American Institute of Certified Public Accountants." The statement continues, however, with the following information: "[m]anagement has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position...." This information compromises substantially the validity of the financial information provided and the claim of financial hardship.

6. Having concluded that the forfeiture was proper, we nonetheless find that it should be reduced under the particular circumstances of this case. RMI consistently acted in good faith and its violations were in all respects minor. Station WMGA, further, is a stand-alone AM station located in a small, rural community of approximately 14,000. We are well aware of the financial difficulties experienced by such stations. Therefore, on our own motion, we will reduce the forfeiture to one thousand dollars ($1,000), a figure that fairly reflects all applicable considerations.

7. In light of the above, the petition for reconsideration IS GRANTED in part and IS DENIED in part. IT IS ORDERED, that Radio Moultrie, Inc., licensee of Radio Station WMGA(AM), Moultrie, Georgia, FORFEIT to the United States of America the sum of one thousand dollars ($1,000) for the willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a), which occurred from February 1990 until September 6, 1991; and for violation of 47 C.F.R. Section 73.3615(a), which occurred from December 1, 1990 until April 3, 1991. Payment of the forfeiture may be made by mailing to the Commission, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NAL/Acct. No. 215LA0014

Boswell Industries, Inc.
Burnaby, B.C. Canada

ORDER

Adopted: June 16, 1993; Released: June 25, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a letter from Boswell Industries, Inc.'s (Boswell) President, Geoff Danzig, requesting dismissal of a July 7, 1992, Forfeiture Order issued by the Commission's Los Angeles, California, field office against Boswell. The Commission's finding of liability for monetary forfeiture is based on Boswell's marketing of a Class B personal computer peripheral in violation of Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R.§2.803. Boswell requests dismissal of the forfeiture based on the fact that the device in question was properly licensed by the Commission. As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $700.

II. BACKGROUND

3. Our records show that on October 23, 1991, FCC inspectors from the Commission's Los Angeles field office who were present at a computer trade show in Las Vegas, Nevada (Fall '91 COMDEX), determined that a Boswell System Phonetic Conversion Keyboard personal computer peripheral being exhibited by Boswell lacked any FCC identification. There were also no visible signs posted to indicate that the device was not for sale or regarding its FCC authorization status as is required by Section 2.803.[1] *See also* 47 C.F.R. §15.101.

4. Following a November 22, 1991, Official Notice of Violation, Boswell's Vice-President responded, claiming that the device which was being exhibited was a proto-typical device which was not for sale, and that it was due to an oversight that the required disclaimer notice was not displayed. On June 8, 1992, Boswell Industries, Inc. was issued a Notice of Apparent Liability (NAL Acct. No. 215LA0014) which proposed a monetary forfeiture of $7,000.

5. Boswell again responded by letter, dated June 15, 1992. This time Boswell's response also indicated that the device in question was in fact authorized under FCC ID. "#194BOZ". Boswell readily admitted, however, that the device was not labeled as required, but reiterated its argument that no forfeiture was warranted because the device that was displayed was a prototype, and not for sale. Rejecting this argument, the Los Angeles field office issued Boswell a Forfeiture Order on July 7, 1992.

6. Boswell appealed the Forfeiture Order by letter dated July 13, 1992.

III. DISCUSSION AND CONCLUSIONS

7. In determining the amount of the forfeiture, we will consider the Commission's policy regarding forfeiture adjustments, *see Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No.92-1321 (D.C. Cir. filed July 30, 1992). The $7,000 NAL and Forfeiture Orders were issued on the basis of a presumed lack of certification for the personal computer peripheral device which Boswell was exhibiting. Boswell has satisfactorily shown that the device was in fact authorized.[2] This fact, however, does not alter the finding that Boswell violated Section 2.803 of the Rules by displaying an unlabeled device or by not prominently displaying a disclaimer notice. The violation was willful. No evidence was adduced to contest this finding.[3]

8. The failure to properly label a device, unlike the marketing of unauthorized devices, however, is a relatively minor violation of Section 302 of the Act. The only remaining violation, therefore, the lack of proper labeling, is a less serious violation of Section 302 of the Act, warranting a downward adjustment of the amount of the forfeiture.

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[1] Under Section 2.803, the advertising or display of a device which has not been granted type approval, type acceptance, certification or notification, will not be deemed to be an offer for sale if such advertising contains, and the display is accompanied by, conspicuous notice worded as follows:

> This device has not been approved by the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained, 47 C.F.R. § 2.803.

[2] Boswell argues that it received approval on July 24, 1991, for its device under FCC ID No. 194BOZ; the FCC ID No. beginning with the numeral "1," whereas Commission records show that the device was approved under the FCC ID No. beginning with an alphabet letter; in this case, the vowel "I."

[3] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b)(*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States.

9. For the foregoing reasons, and considering all downward adjustment criteria established in the Commission's *Policy Statement*, the appropriate amount of forfeiture for this violation is seven hundred dollars ($700).

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED pursuant to Section 1.106(k)(1) of the Commission's Rules, 47 C.F.R. §1.106, that the relief sought by Boswell Industries, Inc. is granted in part and denied in part.

11. IT IS FURTHER ORDERED pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Boswell Industries, Inc. IS LIABLE FOR A MONETARY FORFEITURE in the amount of $700 for violation of Section 302 of the Act and Section 2.803 of the Commission's Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Rules, 47 C.F.R. §1.80(f)(3), that Boswell Industries, Inc. shall, within thirty (30) days of the release of this Order, pay the full amount of the forfeiture. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL Acct. No. 215LA0014," and mailed to the following address:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

13. IT IS FURTHER ORDERED that copies of this Order shall be sent by Registered and First Class mail to Boswell Industries, Inc., 8455 Lougheed Highway, Burnaby, British Columbia, Canada, V5A 1X3.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of the San Mateo County Community College District against Century Cable of Northern California, Inc.	CSR-3766 CA0015

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1993; Released: June 25, 1993

By the Chief, Mass Media Bureau:

1. On December 4, 1993, the mandatory carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), became effective for certain noncommercial educational stations. On January 26, 1993, the San Mateo Community College District, licensee of Station KCSM-TV (Educ., Channel 60), San Mateo, California, filed a petition with the Commission stating that its carriage request had been refused by Century Cable even through the Grade B contour of KCSM-TV covers the cable system's principal headend at Benicia, California, according to the station.

2. On February 12, 1993, Century Cable of Northern California, Inc. ("Century Cable") filed an opposition to the above petition, which it supplemented on April 13, 1993. According to Century Cable, the system serving Benicia carries two educational stations now, and it is considering issues such as headend signal quality, copyright fees, and potential programming duplication to determine which other educator it should add to reach the complement of three mandated by the 1992 Cable Act, enforcement of which Century Cable notes is subject to the *Standstill Order* and to the litigation involving *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C., December 4, 1992). Moreover, Century Cable states that KCSM-TV's petition did not comport with §76.7 of the Commissions Rules, because it did not include an affidavit and did not sufficiently detail the station's efforts to resolve this dispute before it filed with the Commission. Therefore, Century Cable asks that the Commission dismiss KCSM-TV's petition, and that it start its 120 day action period after KCSM-TV submits all the above information.

3. Given that the petition filed with the Commission did contain a "Declaration" made under penalty of perjury that the documents and facts submitted were true from KCSM-TV's General Manager, David H. Hosley, and the appropriate Grade B map of the station's predicted coverage, as well as correspondence requesting carriage dated November 25, 1992, addressed to the cable system's General Manager, Trudy Ribero, KCSM-TV's petition will not be dismissed. In addition, we note that on April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., supra*, which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

4. Therefore, the petition filed January 26, 1993, by the San Mateo Community College District, licensee of Station KCSM-TV, IS GRANTED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Century Cable of Northern California, Inc. IS ORDERED to commence the carriage requested by KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 18, 1993

GTE and BellSouth File Petitions for Exemption from the Commission's Physical Collocation Requirement (CC Docket No. 91-141)

Pleading Cycle Established

COMMENTS DUE: June 28, 1993
REPLIES DUE: July 6, 1992

On June 14, 1993, GTE Service Corporation, on behalf of its GTE affiliated Telephone Operating Companies (GTOCs) and the GTE System Telephone Companies (GSTCs) (together, GTE), filed a petition for exemption from the Commission's requirement to file physical collocation tariffs at five specific central offices. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*). In the *Exemption Order*, GTE petitioned for exemption on the basis of ten state policy decisions. The Common Carrier Bureau (Bureau) denied GTE's petition for six of those states. *See* Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, DA 93-658, released June 9, 1993 (*Exemption Order*). GTE now seeks exemption from the Commission's physical collocation requirement on the basis of space limitation for five specific central offices in those states.

Also on June 14, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for exemption from the Commission's physical collocation requirement for nine specific central offices located in states in which BellSouth's petition for exemption was denied in the *Exemption Order*. In that Order, BellSouth sought exemption on the basis of two state policy decisions, and the Bureau denied BellSouth's petition for both states.

Interested parties filing comments or oppositions to either GTE's or BellSouth's petition are invited to do so no later than **June 28, 1993**. Parties filing replies may do so no later than **July 6, 1993**.

An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of GTE's petition and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-174

In the Matter of

Amendment of Section 73.202(b), RM-8263
Table of Allotments,
FM Broadcast Stations.
(Owensville and Versailles,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1993; Released: June 25, 1993

Comment Date: August 16, 1993
Reply Comment Date: August 31, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Twin Lakes Communications, Inc. ("petitioner"), requesting the substitution of Channel 236C3 for Channel 236A at Versailles, Missouri. Petitioner also requests modification of its license for Station KLGS(FM), Channel 236A, to specify operation on the higher class channel. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Versailles with a wide coverage area FM service. Petitioner notes that Channel 236C3 can be allotted to Versailles, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 237A is substituted for Channel 237C2 at Owensville, Missouri.[1] Channel 237A can be substituted for Channel 237C2 at Owensville, Missouri, consistent with the Commission's spacing requirements at the current site for Station KLZE(FM). Although Station KLZE(FM)'s licensee, Davel Broadcasting Group, Inc. ("Davel") requested and was granted authority to operate on Channel 237C2, effective July 15, 1988, *see Report and Order* (MM Docket No. 87-411), 3 FCC Rcd 3127 (1988), its construction permit for Channel 237C2 was cancelled by staff letter dated October 22, 1992. On April 1, 1993, the Commission sent Davel a letter advising it that unless it filed an FCC Form 301 application for a construction permit for Class C2 facilities within 30 days, it would be made a party to this rule making proceeding and its allotment could be downgraded. Further, the licensee was notified that no extensions of this 30 day period would be granted. Davel did not file a Form 301 to upgrade Station KLZE(FM) to Class C2 facilities. Therefore, Davel is deemed to have abandoned its interest in the Class C2 allotment. Upon termination of this proceeding, we shall modify the license of Station KLZE(FM) to specify operation on Channel 237A.[2] We shall also propose to modify the license for Station KLGS(FM), Channel 236A, Versailles, Missouri, as requested by the petitioner, to specify operation on Channel 236C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 236C3 for Channel 236A at Versailles, Missouri, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Owensville, Missouri	237C2	237A
Versailles, Missouri	236A	236C3

4. IT IS ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making* to the following:

Davel Broadcasting Group, Inc.
309B N. First Street
Owensville, Missouri 65066

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 16, 1993,** and reply comments on or before **August 31, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Rosslyn, Virginia 22209

[1] The coordinates for Channel 236C3 at Versailles are 38-23-27 and 92-38-06.
[2] The coordinates for Channel 237A at Station KLZE(FM)'s licensed site at Owensville are 38-15-22 and 91-32-04.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-60

In the Matter of

Amendment of Section 73.202(b),	RM-7916
Table of Allotments,	
FM Broadcast Stations.	
(Yankeetown, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1993; Released: June 25, 1993

By the Chief, Allocations Branch:

1. Pursuant to the request of William R. Lacy ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 2200 (1992), proposing the allotment of Channel 242A to Yankeetown, Florida, as that community's first local FM service. Petitioner filed comments restating his intention to apply for the channel. No other comments were received.[1]

2. We believe the public interest would be served by allotting Channel 242A to Yankeetown, since it could provide a first local FM service to that community. As indicated in the *Notice*, Channel 242A can be allotted to Yankeetown in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 9, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Yankeetown, Florida	242A

4. The window period for filing applications will open on **August 10, 1993,** and close on **September 9, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] We note that petitioner failed to verify his petition for rule making pursuant to Section 1.52 of the Commission's Rules. Although such failure can result in the dismissal of a petition, we have considered petitioner's proposal since this is an uncontested proceeding and consideration will not result in prejudice to any other parties.

[2] The coordinates for Channel 242A at Yankeetown are North Latitude 29-01-47 and West Longitude 82-42-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-14

In the Matter of

Amendment of Section 73.202(b), RM-8155
Table of Allotments,
FM Broadcast Stations.
(Bethany Beach, Delaware)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1993; Released: June 25, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 789 (1993), issued in response to a petition for rule making filed by Roger A. Akin and Banking Services Corp., Co-Receivers of KAT Broadcasting Corporation ("petitioner"), licensee of Station WWTR(FM), Channel 240A, Bethany Beach, Delaware, proposing the substitution of Channel 240B1 for Channel 240A and the modification of Station WWTR(FM)'s license to specify the higher class channel. Petitioners and Benchmark Radio Acquisition Fund IV Limited Partnership ("Benchmark") filed supporting comments.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 240B1 for Channel 240A at Bethany Beach, since it would provide that community with a wide coverage area service. Channel 240B1 can be allotted to Bethany Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.1 kilometers (0.1 miles) northwest of the community.[2] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WWTR(FM) to specify operation on Channel 240B1.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 9, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bethany Beach, Delaware	240B1, 278A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WWTR(FM), Bethany Beach, Delaware, IS MODIFIED, to specify operation on Channel 240B1 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Roger A. Akin and Banking Services Corp., Co-Receivers of KAT Broadcasting Corporation, licensee of Station WWTR(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Benchmark is the proposed assignee of Station WWTR-FM. An application for the voluntary assignment of license of Station WWTR(FM), from Roger A. Akin and Banking Services Corp., Co-Receivers of KAT Broadcasting Corporation to Benchmark was filed April 27, 1993, (File No. BALH-930428GF). Petitioners and Benchmark both state their intent to apply for the channel, if allotted.

[2] The coordinates for Channel 240B1 at Bethany Beach are North Latitude 38-32-24 and West Longitude 75-03-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-170

In the Matter of

Amendment of Section 73.202(b), RM-8250
Table of Allotments,
FM Broadcast Stations.
(Bemidji, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1993; Released: June 25, 1993

Comment Date: August 16, 1993
Reply Comment Date: August 31, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Thomas J. Lijewski ("petitioner"), requesting the allotment of Channel 238C1 to Bemidji, Minnesota, as that community's third FM broadcast service. Petitioner submitted information in support of the allotment of Channel 238C1 to Bemidji. Petitioner failed to state his intention to apply for Channel 238C1, if allotted to Bemidji, and should correct this deficiency in response to this *Notice*. *See* paragraph 2 of the attached Appendix.

2. We believe petitioner's proposal warrants consideration. Channel 238C1 can be allotted to Bemidji, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Bemidji is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

3. In view of the fact that the proposed allotment would provide an additional broadcast service to Bemidji, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bemidji, Minnesota	266C1, 279C1	238C1, 266C1, 279C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 16, 1993,** and reply comments on or before **August 31, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Timothy E. Welch
Dean George Hill & Welch
1330 New Hampshire Ave., N.W., Suite 113
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 238C1 at Bemidji are 47-28-49 and 94-52-49.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-171

In the Matter of

Amendment of Section 73.202(b),	RM-8257
Table of Allotments,	
FM Broadcast Stations.	
(Lindsborg and Sterling,	
Kansas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 9, 1993; Released: June 25, 1993

Comment Date: August 16, 1993
Reply Comment Date: August 31, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by E. Jerry Davies and Diane Davies d/b/a JD Communications ("petitioner"), requesting the substitution of Channel 238C3 for Channel 240A at Lindsborg, Kansas.[1] Petitioner also requests modification of the license for Station KQNS-FM, Channel 240A, to specify operation on Channel 238C3. Petitioner submitted information in support of the proposal and expressed an intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Lindsborg and the surrounding area with expanded service. Channel 238C3 can be allotted to Lindsborg, Kansas, in compliance with the Commission's spacing requirements provided a channel substitution is made at Sterling, Kansas.[2] Channel 239A was allotted to Sterling, Kansas in MM Docket 91-160.[3] *See* 6 FCC Rcd 5368 (1991). The channel is vacant with no applications on file. Petitioner has proposed the substitution of channel 234A for Channel 239A at Sterling. A staff engineering analysis indicates that Channel 234A can be allotted to Sterling in compliance with the spacing requirements without a site restriction.[4] If applications are filed for Channel 239A at Sterling during the comment period in this proceeding, the applicants will retain cut-off protection and will be permitted to specify the new class A channel, since the channels are equivalent. However, if no applications are filed, we will delete Channel 239A at Sterling and no substitute allotment will be made to the community.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

OPTION I

City	Channel No. Present	Proposed
Lindsborg, Kansas	240A	238C3
Sterling, Kansas	239A	234A

OPTION II

Lindsborg, Kansas	240A	238C3
Sterling, Kansas	239A	---

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 16, 1993,** and reply comments on or before **August 31, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

E. Jerry Davies and Diane Davies
d/b/a DJ Communications
P.O. Box 1069
McPherson, Kansas 67460

6. In addition, the Secretary shall send a copy of this *Notice of Proposed Rule Making* by Certified Mail, Return Receipt Requested, as follows:

Smoky Hill Broadcasting Co., Inc.
203 South Santa Fe
Salina, KS 67402

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's

[1] An application (File No. BALH-920817HO) for assignment of license from Smoky Hill Broadcasting Co., Inc. to E. Jerry Davies and Diane Davies was granted on October 5, 1992. Commission records do not show that the assignment transaction was consummated by the parties. This proceeding will not be terminated until the Commission receives notice that the transaction has been consummated, or that the current licensee, Smoky Hill Broadcasting Co., Inc., will apply for the upgrade. We will serve the licensee with a copy of this *Notice*.

[2] The coordinates for Channel 238C3 at Lindsborg are 38-40-00 and 97-41-30.

[3] A filing window for Channel 239A at Sterling was opened on October 29, 1991, and closed on November 28, 1991.

[4] The coordinates for Channel 234A at Sterling are 38-12-42 and 98-12-12.

Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-18

In the Matter of

Amendment of Section 73.202(b), RM-8173
Table of Allotments,
FM Broadcast Stations.
(Coos Bay, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1993; Released: June 25, 1993

By the Chief, Allocations Branch:

1. At the request of Kenton Sturdevant ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 949 (1993), proposing the allotment of Channel 271A to Coos Bay, Oregon, as the community's third local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Coos Bay its third local FM channel. However, the staff has found that the originally proposed Channel 271A allotment conflicts with the pending application (BPH-930222IG) of Station KGAL-FM, Brownsville, Oregon, effectuating the upgrading of its facilities from Channel 272A to Channel 272C1. Therefore, in light of the Commission's policy to accommodate applications where possible, we will instead allot Channel 228A to Coos Bay. *See Patterson, California*, 7 FCC Rcd 1719 (1992). Channel 228A can be allotted to Coos Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 9, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Coos Bay, Oregon	228A, 254C2, 290C2

4. The window period for filing applications will open on **August 10, 1993,** and close on **September 9, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 288A at Coos Bay are North Latitude 43-22-00 and West Longitude 124-12-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-48

In the Matter of

Amendment of Section 73.202(b),	RM-5772
Table of Allotments,	RM-5941
FM Broadcast Stations.	RM-6533
(Arlington, McKinney, Celina,	RM-6534
Terrell, Daingerfield, College	RM-6535
Station, Caldwell, Howe,	RM-6536
Texas, and Durant, Oklahoma.)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 14, 1993; Released: June 25, 1993

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed by Roy E. Henderson ("Henderson") directed against our *Memorandum Opinion and Order* in this proceeding denying his Application for Review, 6 FCC Rcd 2050 (1991). For the reasons discussed below, we are dismissing the Petition for Reconsideration.

2. *Background.* The *Report and Order* in this proceeding, 5 FCC Rcd 2660 (MM Bur. 1990), upgraded Station KHYI, Arlington, Texas, and Station KTSR, College Station, Texas, and allotted a new Class A FM channel to Howe, Texas. It also dismissed related proposals for McKinney, Terrell and Celina, Texas. Henderson's Application for Review did not object to any of these actions, but instead objected to the fact that the *Report and Order* did not consider a Petition for Rule Making purportedly filed by Henderson on April 8, 1988, proposing the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas.

3. The *Memorandum Opinion and Order* denied the Application for Review. In that action, we first noted that there was no Commission record of the filing of Henderson's Petition for Rule Making prior to May 9, 1988.[1] However, we denied the Application for Review for two other reasons. First, the Petition for Rule Making was not in compliance with our minimum spacing requirements. Second, Henderson was not a permittee at the time he purportedly filed his Petition for Rule Making.[2] As such, he was ineligible to request an upgrade pursuant to Section 1.420(g)(3) of the Rules. In making this latter determination, we specifically rejected the argument that Henderson was eligible to request this upgrade because he had entered into a settlement agreement with the other applicant for the Channel 236A allotment at Caldwell.

4. *Petition for Reconsideration.* Henderson states that the *Memorandum Opinion and Order* raised, for the first time, the question as to the exact date his Petition for Rule Making was filed, its compliance with the Commission's minimum separation requirements, and his eligibility to request an upgrade of the Caldwell allotment. As such, Henderson argues that he should be permitted to address these issues in the context of a Petition for Reconsideration. In support of these arguments, Henderson first argues that it was inequitable for the Commission to question the validity of his original Petition for Rule Making in the context of a *Memorandum Opinion and Order.* In regard to the failure to meet the Commission's minimum separation requirements, Henderson notes that he filed an amendment to his petition in December, 1988, and that this amendment should have been accepted in order to remedy the defect. Henderson notes that this amendment was submitted more than a year before the release of the *Report and Order* in this proceeding. Finally, Henderson again argues that he was, in fact, eligible to request an upgrade in the Caldwell allotment, because he had entered into a settlement agreement with the other applicant for the channel.

5. *Discussion.* We are dismissing the Petition for Reconsideration. Under Section 1.115(g) of the Rules, we will entertain a petition for reconsideration directed against an action denying an application for review only if one of the following requirements are met:

> (1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (2) The petitioner relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.[3]

Henderson has not advanced any facts or circumstances that meet these requirements or would warrant reconsideration of our earlier *Memorandum Opinion and Order.* Therefore, we are dismissing the Petition for

[1] To be considered in this proceeding, a proposal, either in the form of a counterproposal or a separate petition for rule making, must have been filed by the April 21, 1988, comment date. *See* Section 1.420(d) of the Rules. In response to a request by the staff, the former attorney for Henderson submitted a photocopy of the Petition for Rule Making with an April 8, 1988, date stamp. In view of the fact that the Henderson Petition for Rule Making was defective, there was no need to consider the timeliness of that submission.

[2] Henderson did not become the permittee of the Caldwell allotment (now Station KHEN) until December 16, 1988. In a separate context, we are now considering in MM Docket No. 91-58 a Henderson proposal for a Channel 236C2 upgrade at Caldwell, Texas, and modification of his Station KHEN construction permit to specify operation on Channel 236C2.

[3] It is our view that the Henderson Petition for Reconsideration should be considered under Section 1.115(g) of the Rules which specifically refers to petitions for reconsideration directed against a Commission action denying an application for review. In his Petition for Reconsideration directed against the *Memorandum Opinion and Order,* Henderson refers to the requirements set forth in Section 1.429(b) of the Rules which concern petitions for reconsideration of Commission actions which rely on new facts not previously presented to the

Reconsideration pursuant to Section 1.115(g) of the Rules. However, we take this opportunity to make several observations concerning the arguments raised in the Petition for Reconsideration.

6. At the outset, we reiterate that none of our earlier actions concerning the Henderson Petition for Rule Making were premised on any issue as to the Petition's filing date. As stated in the *Memorandum Opinion and Order*, Henderson's Petition for Rule Making, as originally filed, was not in compliance with the Commission's minimum separation requirements. The Henderson proposal was short-spaced to Station KNFO, Channel 238C, Waco, Texas.[4] We believe that the Bureau correctly refused to accept Henderson's Petition for Rule Making. Furthermore, we concur with the Bureau determination that allotment proposals must be technically correct at the time of the filing in order to afford interested parties an opportunity to respond in reply comments. Consistent with Bureau policy, the staff properly refused to accept a corrective amendment to a proposal, after the comment date in a proceeding, in order to have a conflicting proposal considered in that proceeding. *See e.g., Broken Arrow and Bixby, Oklahoma, Coffeyville, Kansas*, 3 FCC Rcd 6507 (MM Bur. 1988), *recon. denied* 4 FCC Rcd 6981 (MM Bur. 1989).

7. Similarly, Henderson has not set forth any new reasons why he should have been considered eligible to request an upgrade in the Caldwell allotment. In this regard, Henderson argues that the staff action in *Santa Margarita, California*, 2 FCC Rcd 6930 (MM Bur. 1987), and the Commission action in *Lafayette, Louisiana*, 4 FCC Rcd 5073 (1989), both cited in the *Memorandum Opinion and Order*, actually support his position. We disagree. In *Santa Margarita*, released nearly five months prior to the comment date in this proceeding, the staff specifically stated that the upgrade provisions of Section 1.420(g)(3) of the Rules were limited to licensees and permittees. Subsequently, in *Lafayette*, we stated that the staff properly declined to upgrade an allotment when applications were pending. The circumstances in *Lafayette* were somewhat different from the circumstances in *Santa Margarita* and this proceeding. *Lafayette* involved a channel allotted in the "omnibus" proceeding in MM Docket No. 84-231.[5] In MM Docket No. 84-231, we stated our policy of allotting the highest class of channel possible to a community. In that action, we had allotted Channel 238A to Lafayette, Louisiana, when, in fact, we could have allotted Channel 238C2. We nevertheless determined that it would be too disruptive to the processing of pending applications to process a petition for rule making proposing an upgrade in the allotment. In that action, we did not overrule the staff decision in *Santa Margarita*. It continues to be our view that at the time of the filing of the original Petition for Rule Making, Henderson should have been aware, through the exercise of ordinary diligence, that we would not entertain a proposal for an upgrade in an allotment proceeding from a pending applicant who was neither a licensee nor a permittee.

8. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Commission. Except for requirement (3) listed below, the requirements of Section 1.429(b) track those of Section 1.115(g). The Section 1.429(b) requirements are as follows:

> (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
>
> (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
>
> (3) The Commission determines that consideration of the facts relied on is required in the public interest.

[4] We also noted that the Henderson proposal would be in conflict with a then pending proposal for a Channel 235A allotment at Huntsville, Texas. As such, an acceptable Caldwell proposal would have had to be considered in conjunction with the Huntsville proposal.

[5] In BC Docket No. 80-90, *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983), *recon. denied* 97 FCC 2d 279 (1984), we created three additional classes of FM channels, Class B1, Class C1 and Class C2. In addition, we determined that a large scale rule making was necessary in order to respond to requests for new FM allotments and expedite service to the public. Subsequently, the *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985), allotted 689 channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

MIDWEST KAAL CORPORATION CSR-3570
IA0014

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1993; Released: June 25, 1993

By the Commission:

INTRODUCTION

1. On September 10, 1992, Televents Group Joint Venture d/b/a Westmarc Cable Group, Inc. [Westmarc] and the National Cable Television Association, Inc. [NCTA] filed petitions for reconsideration of the Commission's decision in *Midwest KAAL Corporation*, 7 FCC Rcd 5119 (1992). In that decision, the Commission issued a declaratory ruling confirming that smaller television market licensees in hyphenated markets may receive network program nonduplication protection throughout each 55-mile zone surrounding each designated community of the market. Westmarc's and NCTA's petitions are opposed by Midwest KAAL Corporation [KAAL]; the National Association of Broadcasters [NAB]; and The 97 Television Stations [the Stations], an informal association of primarily smaller market stations. Westmarc has replied.

2. The Commission's network program nonduplication rules (§§76.92-76.97 of the Commission's Rules) enable a local television station, to require that a cable system, upon proper notification, delete network programs as broadcast by any other station if a local station holds the nonduplication rights for the community in question. The order of nonduplication priority, pursuant to §76.92(b) of the Rules, is as follows:

> (1) First, all television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
>
> (2) Second, all smaller market television broadcast stations within whose secondary zone the community of the community unit is located, in whole or in part.

Therefore, any local station may assert its rights in a zone extending 35 miles from the station's community of license, which is a station's specified zone. In smaller markets, a local station may not only assert its rights in its specified zone, but the station may also assert its rights throughout a secondary zone extending 20 miles beyond the 35-mile specified zone, for a zone of 55 miles in radius surrounding the station's community of license. These zones of protection and their applicability in hyphenated markets are spelled out in a note to this rule which addresses the geographic area of protection:

> With respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority . . . shall be that geographic area agreed upon between the network and the television station. In no event shall such rights exceed the area within which the television station may require broadcast territorial exclusivity rights as defined in §73.658(m), except that small market television stations shall be entitled to a secondary protection zone of 20 additional miles. To the extent rights are obtained for any hyphenated market named in §76.51 such rights shall not exceed those permitted under §73.658(m) for each named community in that market.

In pertinent part, §73.658(m)(1) of the Rules states that:

> [n]o television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non network programming producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away . . . from broadcasting any program purchased by the former station . . . except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in §76.51 of this chapter for those 100 markets listed, and for markets not listed in §76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry.

3. KAAL is the licensee of Television Broadcast Station KAAL (ABC, Channel 6), Austin, Minnesota, which is part of the Rochester, Minnesota-Mason City, Iowa-Austin, Minnesota smaller television market. Algona, Iowa, the city served by Westmarc's system, is located within the secondary zone surrounding the Mason City, Iowa portion of the market. Accordingly, KAAL sought to assert and enforce nonduplication rights on Westmarc's system, against Station WOI-TV (ABC, Channel 5), Ames, Iowa, which is part of the Des Moines-Ames, Iowa major television market (#66). The Commission's ruling in *Midwest KAAL Corporation, supra*, confirmed KAAL's right to do so. In confirming KAAL's rights, we noted that "§73.658(m)(1) of the Rules specifically recognizes nonduplication rights in hyphenated smaller markets." *Id.* at 5121. We further noted that both the *Memorandum Opinion and Order in Docket Nos. 19995 and 18785*, 56 FCC 2d 210 (1975), in which we adopted rules providing additional 20-mile zones of network program nonduplication protection for smaller market stations, and the *Memorandum Opinion and Order in Gen. Docket No. 87-24*, 4 FCC Rcd 2711 (1989), *clarifying on recon.*, 3 FCC Rcd 5299 (1988), in which the current nonduplication rules were adopted, demonstrate "that it would be incongruent with our recognition of the needs of smaller

television markets not to treat hyphenated smaller markets on a par with hyphenated major markets." *Midwest KAAL Corporation*, 7 FCC Rcd at 5121. We found that the language in the note to §76.92 of the Rules, addressing the extent of nonduplication protection in hyphenated major markets, does not bar such protection in hyphenated smaller markets. *Id.* Both Westmarc and NCTA seek reconsideration of this ruling.

SUMMARY OF PLEADINGS

4. In support of their petitions for reconsideration, Westmarc and NCTA contend that §76.92 of the Rules clearly prohibits the interpretation sought by KAAL. Westmarc and NCTA assert that the Commission has, in effect, amended the rule without instituting a rulemaking proceeding in violation of the Commission's own rules and regulations, and the Administrative Procedures Act. Westmarc and NCTA claim that the language in the note to §76.92 of the Rules, stating that "small market television stations shall be entitled to *a secondary protection zone* of 20 additional miles," (emphasis added) means that smaller market stations are entitled only to a single secondary zone even in hyphenated markets. NCTA further claims that the statement in the note that "[t]o the extent rights are obtained for any hyphenated market named in §76.51 such rights shall not exceed those permitted under §73.658(m) for each named community in that market," is an affirmative grant of nonduplication rights to major market stations throughout hyphenated markets of which such stations may be a part, and a purposeful exclusion of smaller market licensee rights in hyphenated markets. Westmarc, in addition, states that nonduplication rights originally did not extend through hyphenated markets, citing *Docket Nos. 19995 and 18785*, 56 FCC 2d at 216-218, and *WCEE-TV, Inc.*, 56 FCC 2d 123 (1975), *recon. denied*, 59 FCC 2d 540 (1976). According to petitioners, therefore, no basis for the Commission's ruling can be found in the language of §§73.658(m) and 76.92 of the Rules. The rules' language is clear and unequivocal. Westmarc and NCTA contend, and thus its plain meaning must control, without interpretation, citing *Beach Communications, Inc. v. FCC*, 959 F.2d 975, 981 (D.C. Cir. 1992), *rev'd and remanded on other grounds*, 61 U.S.L.W. 4526 (June 1, 1993) (No. 92-603); *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *KCMC, Inc. v. FCC*, 600 F.2d 546 (5th Cir. 1979); and 2A Sutherland on Statutory Construction §§46.06, 47.23 (4th ed. 1984).

5. Westmarc and NCTA further assert that the Commission had no intention in *Gen. Docket No. 87-24, supra*, of expanding the scope of nonduplication protection in smaller markets, and that the Commission has failed to explain its rationale for doing so, offering only conclusory statements which, Westmarc states, are insufficient, citing *AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992). Petitioners argue that stations will be able to exert nonduplication rights on cable systems at great distances from the stations under the Commission's ruling, leading to absurd situations. Petitioners also maintain that, due to higher equipment and other costs of compliance, systems may drop duplicating stations from the systems' carriage complements, including such stations' syndicated and local programming.

6. In opposition to Westmarc and NCTA, NAB maintains that the petitions for reconsideration merely reassert arguments previously made to and heard by the Commission, and that they should be denied. NAB and KAAL argue that the Commission's ruling is fully consistent with the language of §§73.685(m) and 76.92 of the Rules, which clearly does not lead to Westmarc's and NCTA's conclusions. KAAL notes that the note to §76.92 "*only limits* the rights of major market stations and is silent on smaller market stations' rights. . .," thus permitting the Commission's ruling, citing *Chevron USA v. National Resources Defense Council*, 467 U.S. 837, 843 (1984), and 1A Sutherland on Statutory Construction §31.06 (4th ed. 1985). The Commission's ruling, NAB and KAAL maintain, is fully in harmony with the Commission's established purpose of providing additional protection to smaller market licensees, a continued concern expressed in *Gen. Docket No. 87-24, supra*. Indeed, argues KAAL, a ruling to the contrary, granting major market licensees more extensive protection in hyphenated markets than smaller market licensees, would be an unexplained departure from precedent. The absurd results hypothesized by Westmarc and NCTA, state opponents, are based upon misinterpretation and misapplication of the Commission's rules, which in any event may be waived in isolated cases which might warrant relief, as the Stations note in support of NAB. Speculative compliance costs, NAB contends, should not be prohibitive, and normally should not exceed $1500 per channel. The Commission's ruling was correct and appropriate, opponents argue, and no new rulemaking proceeding is necessary.[1] In reply, Westmarc contends that the note to §76.92 of the Rules "literally and intrinsically prohibits interpretation," plainly expressing an unambiguous meaning.

DISCUSSION

7. We will deny Westmarc's and NCTA's petitions. The arguments made by NCTA and Westmarc fail to take account of two important points. First, the scope of nonduplication was expanded in *Gen. Docket No. 87-24, supra*, in several ways, including hyphenated markets. Second, the language in the note to §76.92(g) of the Rules is not a singular affirmative grant of protection, but rather is clearly a limitation specific to major market licensees in hyphenated markets. Consequently, Westmarc's reliance on *Docket Nos. 19995 and 18785, supra*, and cases decided under our previous policy is inapposite. The language of §§73.658(m) and 76.92 of the Rules, which recognizes rights in both major and smaller hyphenated markets, though limiting them specifically only in major markets, does not require that the Commission adopt Westmarc's and NCTA's interpretation. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." 2A Sutherland on Statutory Construction §47.23 (5th ed. 1992) (footnotes omitted). Even accepting Westmarc's and NCTA's contentions as an indication that the language of §76.92 may be unclear, "where there is doubt concerning

[1] NAB contends that this issue *was* considered in a rulemaking context, citing *Gen. Docket No. 87-24, supra*.

the extent of the application of the proviso . . . the proviso is strictly construed." *Id.* at §47.08 (footnote omitted). *See also INS v. Stanisic*, 395 U.S. 62, 72 (1969). Our interpretation of our rules in response to KAAL's request for a ruling is clearly reasonable. Consequently, no additional or separate rulemaking proceeding is necessary. *See Chevron v. National Resources Defense Council*, 467 U.S. at 843-844.

8. Were we to interpret §76.92 of the Rules as Westmarc and NCTA suggest, we would be departing from our established policy of treating smaller markets in a way that "compensate[s] for the differences in population density patterns which exist outside large urban areas." *Docket Nos. 19995 and 18785*, 56 FCC 2d at 215. *See also Gen. Docket No. 87-24*, 3 FCC Rcd at 5319. The situation posited by Westmarc and NCTA, where not based upon misinterpretation of our rules, demonstrates only that, in isolated cases, our waiver processes may be invoked to ensure that a rule or policy generally in the public interest operates fairly in a give instance. Nothing in our decision today requires cable systems to drop or to refuse to carry unduplicated programming.

9. In view of the foregoing, we find that grant of Westmarc's and NCTA's petition is not in the public interest.

10. Accordingly, IT IS ORDERED, That the petitions for reconsideration (CSR-3570) filed September 10, 1992, by Televents Group Joint Venture d/b/a Westmarc Cable Group, Inc. and by the National Cable Association, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ARGONIA UNIFIED SCHOOL DISTRICT #359
Zenda, Kansas — File No. BPLIF-911227DT

BUFFALO PUBLIC SCHOOLS
Alva, Oklahoma — File No. BPLIF-920204DC

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1993; Released: June 25, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Argonia Unified School District #359 (Argonia) and Buffalo Public Schools (Buffalo), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels C1-C4 in the areas of Zenda, Kansas and Alva, Oklahoma, respectively.[1] The applicants propose to serve south central Kansas and north central Oklahoma, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded each applicant, we must first determine the basic eligibility of each applicant. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Argonia is a school district accredited by the Kansas State Department of Education, and Buffalo is a school district accredited by the Oklahoma State Department of Education. Argonia is applying to provide ITFS service to schools within its own district. Buffalo proposes to provide formal educational programming to accredited schools outside its jurisdiction. Accordingly, Buffalo has submitted the requisite letters of intended use from its specified receive sites and demonstrated the establishment of local program committees in those communities. See 47 C.F.R. Sections 74.932(a), Notes 2 and 3.

MUTUALLY-EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each applicant is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in predicting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[3] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Argonia and Buffalo are awarded points based on the following criteria:

Localism. We have long recognized that locally based educational entities are the best authorities for evaluating their own educational needs and the needs of others they propose to serve in their communities. Accordingly, we award a significant number of points for localism to institutions and organizations "that are physically located in the community, or metropolitan area, where service is provided." *Second Report and Order, supra* at 59. Here, Argonia is entitled to four points because it is a school district serving the formal educational needs of schools within its jurisdiction. In contrast, Buffalo proposes to

[1] On July 22, 1992, NDW Company, Inc. filed a petition to deny Buffalo's application. In view of the action being taken herein, the petition will be dismissed as moot.

[2] To be considered "local", an applicant must demonstrate that it is physically located in the community or metropolitan area where service is proposed. 47 C.F.R. Section 74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS prgramming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

serve only schools outside its district where it has no physical presence. As such, Buffalo is not entitled to any points as a local applicant.

Accreditation. Only Argonia is entitled to three points for being an accredited school district serving its own students. While Buffalo is an accredited school district, it proposes to serve only students outside its jurisdiction. Therefore, it is not entitled to any points for accreditation. See *Second Report and Order, supra* at 69; 47 C.F.R. Section 74.913(b)(2).

Four-Channel Limitation. Neither of the applicants is the licensee of other ITFS facilities or is applying for additional channels in its proposed service area. Consequently, both of the applicants are entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicants, so long as the excess capacity lease permits such a level of educational programming. *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Argonia's illustrative schedule proposes an average of 24.4 hours of ITFS programming per channel per week.[4] However, the schedule does not indicate which programs are formal educational, as required by Question 5 of Section IV of FCC Form 330. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, Argonia's program grid proposes four hours of formal educational programming per channel per week. Because neither the amount of programming specified in the illustrative schedule or in the grid reaches the threshold at which points are awarded, Argonia is entitled to no programming merit points.

The illustrative schedule for Buffalo proposes an average of 20.4 hours of formal educational ITFS programming per channel per week, while the programming grid proposes 20.5 hours. Because neither the schedule nor the grid reach the threshold amount at which merit points are awarded, Buffalo is entitled to no programming merit points.

E and F-Channel Relocations. Neither of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, neither applicant is entitled to the one point for such applicants.

5. *Total.* Argonia is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Buffalo is entitled to only two points for observing the four-channel limitation. Thus, the selectee is Argonia.

OTHER MATTERS

6. Argonia proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with Ruralvision Central, Inc., which conforms in all respects to the Commission's requirements. Additionally, there are no petitions to deny filed against Argonia's application, and we find that grant of Argonia's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Argonia Unified School District #359 (BPLIF-911227DT) IS GRANTED, the application of Buffalo Public Schools (BPLIF-920204DC) IS DENIED, and the petition to deny filed by NDW Company, Inc. IS DISMISSED as moot.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] Argonia submitted an amendment on March 5, 1993, after the "B" cut-off date of July 22, 1992, indicating that the actual amount of formal educational programming proposed was an average of 24.375 hours per channel per week. If considered, this amendment would upgrade Argonia's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date and, therefore, this amendment will not be considered. See *Second Report and Order, supra* at 74.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 15, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Astroline Communications Company LP - Request for acceptance of a late filed hearing fee for a station at Hartford, Connecticut - **Granted** (April 23, 1993).

Bott II, Richard P. - Request for refund of a hearing fee for a new FM station at Patterson, California - **Granted** (April 23, 1993).

Cloud Nine Broadcasting, Inc, - Request for refund of a hearing fee for a new FM station at Kalispell, Montana - **Granted** (April 29, 1993).

Country Boy Communications, Inc. - Request for refund of a filing fee for a FM broadcast station at Rogersville, Alabama - **Denied** (May 21, 1993).

Dawson-Monk, Barbara d/b/a Urban Network - Request for refund of a hearing fee for a new FM station at Richwood, Louisiana - **Granted** (April 23, 1993).

Founders 47, Inc. - Request for refund of fee overpayment for a new commercial television station at Madison, Wisconsin - **Granted** (May 3, 1993).

Herrin Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Lake Ozark, Missouri - **Granted** (April 23, 1993).

Kinlow, Frederick W. d/b/a F.W.K. Broadcasting - Petition for reconsideration of the denial of the request for refund of a hearing fee for a new FM radio broadcast station at Whitewater, Wisconsin - **Granted** (April 22, 1993).

Lincoln Telephone and Telegraph Company - Request for refund of a filing fee, Lincoln, Nebraska - **Granted** (May 3, 1993).

NWA Television, Inc. - Request for refund of a filing fee for a station at Fort Smith and a station at Rogers, Arizona- **Denied** (April 30, 1993).

Powley, Caroline K. d/b/a Unicorn Slide - Request for refund of a hearing fee for a new FM station at Slidell, Louisiana - **Granted** (April 30, 1993).

Prettyman Broadcasting Company - Request for reconsideration of denial of requests for waivers of filing fees for two stations at Salisbury, Maryland - **Denied** (May 12, 1993).

Richmond, Robert M., et al - Request for refund of a hearing fee for a new FM broadcast station at Beaumont, California - **Denied** (April 30, 1993).

Seabase, Tom - Request for refund of a hearing fee for a new FM station at Kalispell, Montana - **Granted** (April 23, 1993).

Skyline Broadcasters, Inc. - Request for refund of a hearing fee for a new FM station at Kalispell, Montana - **Granted** (April 30, 1993).

Thomas, Jeff and Joella - Request for refund of a hearing fee for a station at Kirtland, New Mexico - **Granted** (May 14, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 29 1993

Martin W. Hoffman, Esq.
363 Main Street
Hartford, Connecticut 06106

Dear Mr. Hoffman:

This is in response to your request for acceptance of late filed hearing fee tendered on behalf of Astroline Communications Company Limited Partnership (Astroline), Debtor-in-Possession and renewal applicant for the license to WHCT-TV, Hartford, Connecticut.

By way of background, Astroline's renewal application is mutually exclusive with several applications for a construction permit for a new television station to operate on Channel 18, Hartford, Connecticut. One of these applicants, Shurberg Broadcasting of Hartford (Shurberg), filed pleadings in opposition to your request, and you responded to those pleadings.

Turning to the merits, you state that you are the Trustee in bankruptcy for Astroline in a Chapter 7 proceeding. You also state that the Commission has granted the assignment of the Debtor's broadcast station license to you. You further relate that, on or about August 2, 1991, the attorney for Shurberg contacted you and advised you that a hearing fee for the Debtor's renewal application was due to be paid by July 1, 1991. You contend that you had no knowledge or notice of this deadline, and that in the course of complying with other Commission regulations, no one advised you of the hearing fee filing deadline. You subsequently paid the fee.

Shurberg recites that a Commission rulemaking proceeding required pending mutually exclusive applicants, including renewal applicants, that had not been designated for hearing prior to July 1, 1991, to tender their hearing fees by July 15, 1991. Shurberg contends that it was the sole applicant to pay the hearing fee in a timely manner, and requests that the remaining applications, including Astroline's, be dismissed, and that its application be granted. In support of its opposition, Shurberg argues that counsel for Astroline was aware of the competing applications that were mutually exclusive with Astroline's renewal. Shurberg argues that Astroline cannot now rely on claims of ignorance of the July 15 hearing fee deadline.

Upon consideration of your request, we have concluded that you have shown good cause for waiver of the July 15, 1991 hearing fee deadline and that waiver in this instance would promote the public interest. See 47 C.F.R. § 1.1115(a). The Commission has in the past recognized that a bankruptcy Trustee representing a debtor

licensee before the Commission occupies a special or unique position before the agency. See, e.g, LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974). While still subject to the Commission's rules and regulations, we realize that the bankruptcy Trustee nevertheless has a different mission, and that strict enforcement of our rules resulting in dismissal of the underlying license runs directly counter to his statutory role -- distribution of the debtor's assets to the maximum benefit of creditors -- especially since the license itself may be the most valuable asset the debtor holds in possession. Id. at 1149-50.

Moreover, the particular rule involved here was primarily adopted for a purpose that has little relevance to your role in the Hartford proceeding. The Commission adopted the requirement for early payment of hearing fees in its proceeding to expedite the comparative hearing procedures for new broadcast facilities. The proceeding was designed primarily to expedite the provision of new services to the public. The Commission thus stated that the intent of the rule was to expedite the comparative hearing process for new broadcast facilities "by [e]ncouraging more and/or earlier settlements." See Report and Order on Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1991), recon. granted in part, 6 FCC Rcd 3403 (1991). Although the proceeding and rule were directed at new applicants and new applicant proceedings, the Commission, simply as a matter of fairness, decided to apply the requirement for early payment of hearing fees to all pending mutually exclusive applications, including renewals. Nevertheless, the main purpose of the rule, encouraging settlements by new applicants, especially in proceedings for new facilities, appears to have little bearing on renewal applicants. Comparative renewal proceedings do not involve the authorization of new service to the public, and the Commission has no general policy that encourages renewal applicants to enter into settlement agreements with challengers that result in the discontinuance of licensees' existing service to the public.

In addition, as you have indicated, you made a bona fide attempt to comply with the Commission's regulations, but you were unaware of the requirement for accelerated payment of the hearing fee by a date certain. However, you appear to have been concerned with submitting your fee in the most expeditious manner upon learning that it was past due, and your fee arrived shortly after the deadline. In sum, we believe that the public interest would not be furthered by stringent application of the rule to your situation; your role as Trustee for Astroline Communication Company Limited Partnership, Debtor-in-Possession, warrants waiver of the July 15, 1991 hearing fee deadline regarding the debtor's renewal application for the license to WHCT-TV, Hartford, Connecticut.

Accordingly, the petition to dismiss the debtor's renewal application is denied and your request for waiver of the hearing fee deadline is granted.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 23 1993

Harry C. Martin, Esq.
Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

Dear Mr. Martin:

This will respond to your request for refund of a hearing fee filed on behalf of Richard P. Bott II in connection with his construction permit application for a new FM station at Patterson, California.

You state, and your documentation demonstrates that, prior to designation for hearing, Mr. Bott entered into a settlement agreement with his competing applicants. The Mass Media Bureau approved the settlement agreement, dismissed several applications including that of Mr. Bott's, and granted the remaining application.

Under the circumstances, since Mr. Bott voluntarily dismissed his application and was not designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 29 1993

Robert Lewis Thompson, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

Dear Mr. Thompson:

This will respond to your request for refund of a hearing fee filed on behalf of Cloud Nine Broadcasting, Inc. ("Cloud Nine") in connection with its construction permit application for a new FM station at Kalispell, Montana.

You state, and our records reflect, that prior to the Notice of Appearance deadline, Cloud Nine entered into a settlement agreement with its competing applicants. The settlement agreement subsequently was approved, the competing applications were dismissed, and Cloud Nine's application was granted.

Section 1.1111 (c) (4) of the Commission's rules provides for a refund of a hearing fee whenever a settlement agreement is timely filed and the remaining application is immediately grantable. Under the circumstances, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 21 1993

Lauren A. Colby, Esq.
10 East Fourth Street
Post Office Box 113
Frederick, MD 21701

Dear Mr. Colby:

This is in response to your request for refund of the $80.00 application fee submitted on behalf of Country Boy Communications, Inc. in connection with its FCC Form 316 application for consent to the assignment of its construction permit to a corporation filed on November 4, 1992.

You state that you were advised by the FCC staff that the application was inappropriate for submission on the "short form" (FCC Form 316) and must be resubmitted on the "long form" (FCC Form 314). You also state that you resubmitted the application on FCC Form 314 on November 27, 1992 with a check in the appropriate amount of $565.00 in payment of the filing fee.

Section 1.1111 of the Commission's Rules provides that a return or refund of fees shall be made only in certain specific circumstances. 47 C.F.R. § 1.1111. The rule does provide for the refund of a fee when the fee processing staff or bureau/office determines that an insufficient fee has been submitted. 47 C.F.R. § 1.1111(a)(2). However, that provision is inapplicable to your situation. The Mass Media Bureau did not return Country Boy's application because of the submission of an insufficient fee. Rather, the Bureau determined, upon a review of the "short form" application filed, that the action sought could not be granted on the basis of the information provided therein.

In establishing the criteria for refunding its fees, the Commission explained that: "once an application has cleared the fee review process, its subsequent rejection by the relevant bureaus or offices for any reason will not result in a fee refund." Establishment of a Fee Collection Program to Implement

the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 at ¶ 13 (1987). (emphasis added)

Accordingly, your refund request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 23 1993

William J. Pennington, III
4 Creekside Drive
Pawleys Island, South Carolina 29585

Dear Mr. Pennington:

This will respond to your request for refund of a hearing fee filed on behalf of Barbara Dawson-Monk d/b/a Urban Network in connection with her construction permit application for a new FM station at Richwood, Louisiana.

You have requested a refund because you state, and our records reflect, that prior to the Notice of Appearance deadline, Barbara Dawson-Monk voluntarily dismissed her application pursuant to a settlement agreement. The settlement agreement subsequently was approved, Barbara Dawson-Monk's application was dismissed, and the single remaining applicant was granted. Memorandum Opinion and Order, FCC 93M-40 (January 27, 1993). Under the circumstances, since the settlement agreement was timely filed and the remaining application was immediately grantable, refund of the hearing fee is appropriate under 47 C.F.R. §1.1111(c)(4).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 3 1993

Ann C. Farhat, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036

Dear Ms. Farhat:

This is in response to your request for refund of fee overpayment submitted on behalf of Founders 47, Inc. (Founders), applicant for a new commercial television station in Madison, Wisconsin.

You state that, on October 30, 1992, Founders tendered a fee of $2,535.00 in connection with its application for a construction permit. You also state that, due to an error in the transmittal letter submitted with the application, Founders forwarded to Pittsburgh another application and accompanying fee on November 2, 1992, along with instructions that only one fee should be processed. You further explain that both $2,535.00 checks were in fact processed and you now seek refund of the overpaid amount.

Your request for refund of fee overpayment will be granted as the amount in question is $8.00 or more. See 47 C.F.R. § 1.1111(a)(5) "Note." Accordingly, a check for $2,535.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 23 1993

Nathaniel F. Emmons, Esq.
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5383

Dear Mr. Emmons:

This will respond to your request for refund of a hearing fee filed on behalf of Herrin Broadcasting, Inc. ("HBI") in connection with its construction permit application for a new FM station at Lake Ozark, Missouri.

You state that prior to the Notice of Appearance deadline, HBI and its competing applicant filed a settlement agreement. The settlement agreement subsequently was approved, the competing application was dismissed, and HBI's application was granted without hearing. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(4).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
APR 12 1993

OFFICE OF
MANAGING DIRECTOR

John S. Neely, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

Dear Mr. Neely:

This is in response to the Joint Petition for Reconsideration of the Managing Director's January 27, 1993 letter denying the request for refund of hearing fee tendered by Frederick W. Kinlow d/b/a F.W.K. Broadcasting (FWK), former applicant for a new FM radio broadcast station at Whitewater, Wisconsin.

You state that the hearing fee in this proceeding was due by July 15, 1991, but that FWK did not pay its hearing fee until August 12, 1991. The ALJ in this proceeding initially granted FWK's request for acceptance of late tendered fee (see Memorandum Opinion and Order, FCC 91M-2682, released August 30, 1991); the Review Board, however, later determined that the ALJ lacked authority to act on this fee issue and referred the matter to the Managing Director (Memorandum Opinion and Order, 6 FCC Rcd 6540 (Rev. Bd. 1991). By letter dated March 19, 1992, the Managing Director denied FWK's request for waiver of the July 15 fee deadline and refunded the late-filed fee. FWK appealed the Managing Director's decision and tendered another hearing fee: that appeal was ultimately resolved by settlement. In its January 1993 letter, the Managing Director determined that the fee FWK tendered with its appeal could not be returned because the settlement agreement was not filed in a timely manner so as to permit refund of the fee under Section 1.1111(b)(4) of the Rules. You now argue that FWK's appeal and its subsequent resolution by settlement do not change the Managing Director's March 1992 ruling that FWK's hearing fee be refunded, and request that the January 1993 action be reversed.

FWK participated in this comparative proceeding to a very limited extent and only as directed by the ALJ. See, e.g., 19 minute prehearing conference held on September 23, 1991 (scheduled in Order, FCC 91M-2272, released July 25, 1991, and also cited in note 3 of the ALJ's August 30, 1991 Memorandum Opinion and Order); and Memorandum Opinion and Order, FCC 92M-261, released February 27, 1992 (denying FWK's February 4, 1992 Motion for Summary Decision on the air hazard issue specified in the Hearing Designation Order, 6 FCC Rcd 4438 (1991). However, because FWK was never formally subject to the comparative hearing process after it appealed the dismissal of its application, and any pleadings filed or Commission actions taken subsequent to FWK's appeal concern the dismissal, the request for refund may be granted. Accordingly, a check in the

amount of $6,760.00, payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 3 1993

Robert A. Mazer, Esquire
Nixon, Hargrave, Devans & Doyle
Suite 800
One Thomas Circle
Washington, D.C. 20005

Dear Mr. Mazer:

This is in response to your request for refund of the fee submitted by The Lincoln Telephone and Telegraph Company (Lincoln) with its petition for waiver of the Commission's price cap regulations in connection with its 800 Data Base service tariff.

You state that it is now apparent, following conversations with the staff, that no fee was required to accompany Lincoln's waiver request.

In reconsidering its FEES II decision, the Commission determined that a fee payment is required only with petitions for waiver of the accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919, 1923 (1991). Moreover, the Commission clarified that no fee requirement applies to petitions for waiver of the tariff rules and regulations. Id.

Accordingly, your request for a refund is granted. A check, drawn in the amount of $4,660.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 30 1993

Sol Schildhause, Esq.
Farrow, Schildhause & Wilson
1400 Sixteenth Street, N.W.
Suite 501
Washington, D.C. 20036

Dear Mr. Schildhause:

This is in response to your request for return of the filing fee tendered by NWA Television, Inc. (NWA) in connection with its application for consent to assign licenses for KPOM-TV (BALCT-920911KH) and KFAA(TV) (BALCT-920911KI).

In support of your request, you state that the contract that was submitted with the application included a conventional 180-day quiet period to allow for Commission processing. You also state that although you reminded the staff of this time limitation, the processing was not completed by the time the contract deadline passed. Consequently, you notified the Commission that the contract did not survive processing and now seek refund of the filing fee on the grounds that service was not timely rendered.

It has been the Commission's policy since the inception of the Fee Collection Program to retain fees irrespective of the substantive disposition of the underlying application or filing, except in certain limited circumstances enumerated in Section 1.1111 of the rules, none of which is relevant here. Establishment of a Fee Collection Program, 2 FCC Rcd 947, 929 (1987) (subsequent history omitted). In addition, attachments to your letter indicate that the staff expended considerable effort in processing the subject application, and therefore incurred costs that the fee was intended to defray.

Accordingly, your request for refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 30 1993

Lee J. Peltzman, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Peltzman:

This will respond to your request for refund of a hearing fee filed on behalf of Caroline K. Powley d/b/a Unicorn Slide in connection with her construction permit application for a new FM station at Slidell, Louisiana.

You state, and your documentation shows, that prior to the Notice of Appearance deadline, Caroline K. Powley voluntarily dismissed her application pursuant to a settlement agreement. The settlement agreement was subsequently approved, and the remaining applicant was granted without hearing. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(4).

Accordingly, your request is granted. Although you requested a refund of $6,770.00, the original check was drawn in the correct amount as set forth in 47 C.F.R. §1.1104(2)(c). Therefore, a check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAY 1 2 1993

OFFICE OF
MANAGING DIRECTOR

D'wana R. Speight, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037

Dear Ms. Speight:

This is in response to your Request for Reconsideration of Denial of Requests for Waivers of Filing Fees submitted on behalf of Prettyman Broadcasting Company (Prettyman), licensee of Radio Stations WICO(AM)/WICO-FM, Salisbury, Maryland.

By letter of September 22, 1992, the Associate Managing Director for Operations (AMD-O) denied Prettyman's request for waivers of the filing fees tendered in conjunction with applications for extension of construction permits for the above stations. By way of background, the permits relate to the relocation of WICO-FM to another channel and proposed modifications of the stations' facilities. You further state that this relocation is caused by the Commission's allocation of WICO-FM's previous channel to Cambridge, Maryland. You explain that you have been forced to seek extensions of the changes in the Salisbury stations' facilities pending construction of the Cambridge facility on WICO-FM's previous channel. In this regard, you claim that the time for construction of the Cambridge facility is a matter beyond Prettyman's control. Accordingly, you now seek reconsideration of the AMD-O's conclusion that the postponement of modifications to WICO-FM and WICO(AM) was within Prettyman's control.

The AMD-O denied the request for waivers on the grounds that Prettyman alone decided, as a business matter, to postpone its relocation and associated upgrade until the Cambridge permittee commenced construction of its facility. This postponement may well have been "both logical and reasonable since the Cambridge facility was the impetus for WICO-FM's ordered relocation" (Request at 2); however, the delay was in no way required by the Commission. Therefore, we do not agree with your contention that "Prettyman's postponement request should not be characterized as an indicator that the actual relocation is within Prettyman's direct control." Id. While your Request and related attachments recite in copious detail the facts underlying Prettyman's numerous extension requests, they offer no support for your argument that the most recent requests (or for that matter, any of the others) arise from circumstances beyond Prettyman's control such that fee waivers are warranted.

Accordingly, your request for waivers of the filing fees is denied.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

APR 30 1993

OFFICE OF
MANAGING DIRECTOR

Bradford D. Carey, Esq.
Hardy and Carey
111 Veterans Boulevard
Metairie, Louisiana 70005

Dear Mr. Carey:

This is in response to your request for refund of hearing fee submitted on behalf of Robert M. Richmond, et al (Richmond), former applicant for a new FM radio broadcast station at Beaumont, California (MM Docket No. 92-310).

You state that Richmond tendered its hearing fee along with the Notice of Appearance by the appropriate deadline. You also state that Richmond voluntarily dismissed his application subsequent to this date. You argue that refund of Richmond's hearing fee is appropriate because the presiding ALJ took no other action regarding Richmond's application other than the Order dismissing the application.

The Commission's rules provide for refund of the hearing fee paid by broadcast applicants under certain limited circumstances. See 47 C.F.R. § 1.1111(b). We are unable to refund Richmond's fee because he dismissed his application subsequent to his filing a Notice of Appearance in this proceeding. Therefore, his dismissal, while voluntary, was not executed in a timely fashion, see 47 C.F.R. § 1.1111(b)(2), and your request does not contain sufficient information to justify waiver of the rule.

Accordingly, your request for refund of the hearing fee is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 23 1993

Richard F. Swift, Esq.
Tierney & Swift
1200 18th Street, N.W.
Suite 210
Washington, D.C. 20036

Dear Mr. Swift:

This will respond to your request for refund of a hearing fee filed on behalf of Tom Seabase in connection with his construction permit application for a new FM station at Kalispell, Montana.

You state, and your documentation shows that, prior to the Notice of Appearance deadline, Tom Seabase voluntarily dismissed his application pursuant to a settlement agreement. The settlement agreement subsequently was approved, and the single remaining applicant was immediately grantable.

Section 1.1111 (c) (4) of the Commission's rules provides for a refund of a hearing fee whenever an application is withdrawn pursuant to a settlement agreement prior to the Notice of Appearance deadline. Since the settlement agreement was timely filed and the remaining application was granted, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 30 1993

John Joseph McVeigh, Esquire
Fisher, Wayland, Cooper
& Leader
1255 Twenty-third Street, N. W.
Washington, D.C. 20037-1125

Dear Mr. McVeigh:

This is in response to your request for refund of the hearing fee submitted by Skyline Broadcasters, Inc. (Skyline) in connection with its application for a new FM station at Kalispell, Montana.

You state that Skyline and two competing applicants were designated for a comparative hearing to select the licensee at Kalispell. Skyline timely filed its Notice of Appearance and the competing applicants, including Skyline, simultaneously filed a settlement agreement. The agreement provided that Skyline's application would be dismissed. The presiding Administrative Law Judge approved the settlement agreement, granted the application specified in the agreement and dismissed Skyline's application.

Section 1.1111(c)(4) of the Commission's rules provides for the refund of a hearing fee when a settlement agreement is filed with the presiding ALJ prior to the deadline for filing Notices of Appearance. 47 C.F.R. § 1.1111(c)(4). Our review of this matter discloses that Skyline timely filed its settlement agreement for purposes of receiving a refund.

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Messrs. David D. Oxenford and John M. Burgett
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Messrs. Oxenford and Burgett:

This will respond to your request for refund of a hearing fee filed on behalf of Jeff and Joella Thomas in connection with their construction permit application for a new FM station at Kirtland, New Mexico.

You state, and your documentation shows, that the other mutually exclusive applicant failed to submit its hearing fee and further that the Thomases complied with the Bureau's directive regarding the Commission's environmental rules. Therefore, the need for a comparative hearing has been obviated. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(1); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act, 6 FCC Rcd 5919, 5925 (1991).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1993 — 342-145/30021